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44

**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW YORK.**

---

**BY**  
**SAMUEL JONES AND JAMES C. SPENCER,**  
**REPORTERS OF THE COURT.**

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**JUDGES**  
**OF THE**  
**SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW YORK,**  
**DURING THE TIME OF THIS VOLUME OF REPORTS.**

---

**WILLIAM E. CURTIS,**  
*Chief Justice.*  
**JOHN SEDGWICK,**  
**HOOPER C. VAN VORST,**  
**GILBERT M. SPEIR,**  
**CHARLES F. SANFORD,**  
**JOHN J. FREEDMAN,**  
*Justices.*



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**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW YORK**  
**AT GENERAL TERM**

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**HENRY HOFFMAN, AN INFANT, &C., PLAINTIFF  
AND APPELLANT, v. NEW YORK CENTRAL  
& H. R. R. R. CO., DEFENDANT AND RESPON-  
DENT.**

**MASTER AND SERVANT.—RAILROAD COMPANIES.**

If the master, when sued for an injury resulting from the tortious act of his servant while apparently engaged in executing his orders, claims exemption on the ground that the servant was in fact pursuing his own purposes, without reference to his master's business and was acting maliciously and willfully, it must, ordinarily, be left to the jury to determine the issue.

Where different inferences may be drawn from the facts proved, and, when, in one view, they may be consistent with the liability of the master, the case must be left to the jury (*Rownes v. Del. Lack. & Western R. R. Co.*, 64 N. Y. 129).

When a train is in motion and a man appears with a conductor's cap and badge and acts as such and is so recognized, it must be presumed that he is in the railroad company's employment as a conductor.

The duty of protecting the train from trespassers, and of removing them from it, seems to be incident to, and within the scope of such powers as belong to the person in charge of it,—i. e., the conductor.



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Opinion of the Court, by CURTIS, Ch. J.

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Before CURTIS, Ch. J., and SANFORD, J.

*Decided April 1, 1878.*

Appeal from a judgment entered in the defendant's favor upon the dismissal of the plaintiff's complaint. The facts are sufficiently stated in the opinion of the court.

*Nelson Smith*, for appellant.

*Frank Loomis*, for respondents.

BY THE COURT.—CURTIS, Ch. J.—The learned judge before whom this cause was tried at the special term, dismissed the complaint, to which the defendant excepted. The action is to recover damages for an injury to the person.

The testimony shows, that the plaintiff, a lad eight years of age, while on his way to school, jumped upon the platform of one of the cars of defendant's outgoing train in Eleventh avenue, to ride from Thirty-ninth street to Forty-fourth street. That he sat upon the step or platform, and that, a little above Fortieth street, hearing the door of the car open, he rose up, and a man neatly dressed with a conductor's cap and badge on, came out, looked at him, and, without saying anything, gave him a kick, and kicked him off on to the ground. He fell with his right leg under the wheels of the car. The leg was crushed and had to be amputated.

When a train is in motion, and a man appears with a conductor's cap and badge, and acts as such, and is so recognized, it must be presumed, that he is in the railroad company's employment as a conductor. It must also be regarded that a conductor is one of the necessary agencies for the the conducting, control, and management of a train. The term, and the office,

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Opinion of the Court, by CURTIS, Ch. J.

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and the duties resulting from it, are common and well known, as well as those of a brakeman and an engineer (Hughes v. New York and New Haven R. R. Co., 4 J. & S. 222). The duty of protecting the train from trespassers, and of removing them from it, seems to be incident to, and within the scope of such powers as belong to the person in charge of it. In addition to this, the rules and regulations of the defendant's road read in evidence place the conductor in charge of the train upon the road, and make him responsible for its management. They apparently make it his duty not to allow trespassers upon the cars, and to protect the train from them. The reasonable discharge of this duty might require him under some circumstances to remove them from the train; such an act would be within the scope of his employment.

The defendant moved, at the trial, that the complaint be dismissed, upon the grounds that this act of the conductor was willful and malicious, and without the scope of his authority, and that the negligence of the plaintiff contributed to the injury. The motion was granted, and the plaintiff excepted, and among other things excepted to the refusal of his request that the question be submitted to the jury, whether the act of the conductor was malicious.

Although the lad was a trespasser, he was entitled to be protected against unnecessary injury on the part of those exercising the right of removing him, and there is no justification for doing it so recklessly or carelessly as to imperil his life and cause the loss of a limb.

A question presented is whether this request of the plaintiff, in view of all the facts and circumstances, to go to the jury as to there being any malice in the act of the conductor, should have been granted.

It appears to me that this is a case where the conductor acted without malice or ill feeling towards the

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Opinion of the Court, by CURTIS, Ch. J.

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plaintiff. There was nothing in the conduct of this child of eight years of age to beget malice towards it on the part of the conductor. It is more consistent with the testimony presented, that the conductor acted through heedlessness, or zeal, or impetuosity or infirmity of disposition, and used more force than was necessary to accomplish what he felt was a duty resting upon him ; that is, to keep the platform of the car clear of trespassers.

Even if the defendant is exonerated from liability for the willful and malicious act of its servant, the question whether such was the character of the act still remains a fact for the determination of a jury. In the case of *Johnson v. Second Avenue R. R. Co.* (47 *N. Y.* 274), where the conductor, in removing a person from the car for the non-payment of his fare, in doing so, struck him unnecessarily in the face, the court held that the question whether this act was willful or malicious, or arising from zeal or impetuosity of temper in the discharge of what he deemed to be his duty, was a question of fact, and that it should have been left to the jury. This ruling is cited and followed in *Rounds v. Del. L. & W. R. R. Co.* (64 *N. Y.* 129). In this latter case, which varies from the present one, there is the difference that it was a baggage-man who kicked the boy off the platform of the train, and that there were printed notices posted up, one in the baggage car, and another one near where the plaintiff was standing on the platform, to the effect that no one would be allowed to ride on the baggage car, except regular train men, and that the conductor and baggage-man must see this order strictly enforced.

What authority was conferred on the baggage-man, and from what source it emanated, is less clear, than the authority of the conductor in the present case, to remove a trespasser from the platform ; yet the court held that this question of fact, whether the violence of

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Concurring opinion of SANFORD, J.

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the baggage-man was willful and malicious, was one that must be submitted to the jury. The principle that governs is thus stated in the opinion of ANDREWS, J.: "There may be cases where this rule does not apply, and where the court would be justified in taking the case from the jury; but where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury."

I incline to the view that the cases above referred to, and which are later decisions than that of *Isaacs v. Third Avenue R. R. Co.*, 47 *N. Y.* 122, control the question in the case under consideration; and that, being governed by them, we must hold that the question of the existence, on the part of the conductor, of willfulness and malice in his act as a question of fact, should have been submitted to the jury.

The judgment should be reversed, and a new trial ordered, with costs to the appellant, to abide the event of the suit.

CONCURRING OPINION OF SANFORD, J.—In the case of *Hughes v. N. Y. and N. Haven R. R. Co.* (36 *N. Y. Super. Ct.* [4 *J. & S.*] 222), a railroad company was exonerated from liability for the act of a brakeman in its employ, who forcibly ejected a trespasser from the platform of a freight train *while in motion*. The grounds of the decision are, that while the train was moving at a rate which rendered such ejection dangerous, it was unlawful for any one to eject even a trespasser therefrom, and that while it might be presumed that by his general powers the brakeman was authorized, in a proper manner, and under proper circumstances, to remove intruders, his authority would not be deemed to extend to or cover a case in which it would have been unlawful for his employers to do the act which he assumed to perform. The court followed

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Concurring opinion of SANFORD, J.

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the precedent established in *Isaacs v. Third Avenue R. R. Co.* (47 *N. Y.* 122), where it was held that the defendants were not liable for the act of their servant, a conductor, who refused to stop his car at the instance of a passenger about to alight, and forcibly ejected her from the platform, while the car was in motion. In following that case, the distinction between it and that of *Jackson v. Second Avenue R. R. Co.* (47 *N. Y.* 274) was carefully pointed out. The conductor having in Jackson's case stopped the car in order to put off the passenger who had refused payment of the fare demanded. Under the authority of *Isaacs v. Third Avenue R. R. Co.* the act of the brakeman was held to be a personal tort, for which he alone, and not his employers, were responsible. The same principle seems applicable to the case now under consideration, and it would be our duty to adopt or apply it, were it not for the controlling authority of a still more recent decision of the court of appeals, in which it is said, "If the master, when sued for an injury resulting from the tortious act of his servant, while apparently engaged in executing his orders, claims exemption on the ground that the servant was, in fact, pursuing his own purposes, without reference to his master's business, and was acting maliciously and willfully, it must ordinarily be left to the jury to determine the issue," and that where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury (*Rounds v. Del. Lack. & W. R. R. Co.*, 64 *N. Y.* 129).

While I should personally regard the conduct of the conductor in this case, as willful, violent and reckless, to a degree even more reprehensible than was made to appear, either in the case of *Isaacs v. Third Avenue R. R. Co.*, or in that of *Hughes v. New York & New Haven R. R. Co.*, and as constituting a crim-

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Concurring opinion of SANFORD, J.

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inal assault, altogether beyond the scope of his employment, it may be that others would draw a different inference from the evidence, and if so, a non-suit should not have been ordered. The cases of *Isaacs v. Third Avenue R. R. Co.*, and of *Hughes v. New York & New Haven R. R. Co.* were called to the attention of the court, in *Rounds v. Delaware, Lackawana and Western R. R. Co.*, but were not commented upon in the opinion there rendered. That they were not followed, is a sufficient reason for regarding as abrogated the rule they were understood to have confirmed.

In *Cohen v. Dry Dock, East Broadway and Battery R. R. Co.* (40 *Super. Ct.* [8 *J. & S.*] 368; affirmed in court of appeals, March 27, 1877, 4 No. 7 *Weekly Dig.* 334, but not yet reported), the action of defendant's servant, the driver of a horse railroad car, was much less flagrant and vicious, and therefore less indicative of a willful and malicious purpose than that of the defendants' conductor in the case at bar, and the facts clearly distinguished the case as the court held, from *Isaacs v. Third Avenue R. R. Co.* The facts and circumstances, as they appeared in evidence, in *Rounds v. Delaware, Lackawana and Western R. R. Co.*, are, however, too closely analogous, both to those in *Isaacs'* case and to those now under consideration, to admit of any substantial distinction; and for that reason I concur with the chief justice in directing that the judgment appealed from be reversed and a new trial ordered.

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Statement of the Case.

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**MORTIMER HENDRICKS, PLAINTIFF AND RESPONDENT, v. SIXTH AVENUE RAILROAD COMPANY, DEFENDANT AND APPELLANT.**

**CARRIERS OF PASSENGERS, THEIR DUTIES, RESPONSIBILITIES AND LIABILITIES.—DAMAGES.**

The conductor and driver of street-cars are the agents and servants of the corporation or persons by whom they are employed, and to their judgment, care and skill the conveyance and safety of the passengers are confided. This duty must be discharged by them with diligence, prudence and foresight.

The introduction of a manifestly intoxicated, quarrelsome and indecently-attired man into a street car by the employees of the company is an act of negligence for the consequences of which the company is liable; and when the conductor admits such a person into the car, in response to a statement of the driver that such person is "too full" to ride on the front platform, the negligence is aggravated and unjustifiable. A verdict against the company for damages for personal injuries sustained by a passenger from an unprovoked assault by such person under such circumstances, should not be set aside on the ground that there is no evidence of negligence.

The plaintiff in this case was severely injured about the head and face by blows received, as above stated. A verdict of \$1,000, —*Held*, not excessive.

The master is answerable in damages for the mere negligence of his servant, only to the extent of compensation for the injury received. The court should have charged the jury, on the request of the defendant, that the case was not one in which punitive or exemplary damages might be awarded.

**EVIDENCE.**

Statements of the conductor in regard to the occurrence, not made at the time of the act so as to constitute a part of the *res gestæ*, and being recitals of what the driver told him at the time of the event, are in the nature of hearsay evidence and inadmissible, and should have been excluded on objection.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided April 1, 1878.*

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Opinion of the Court, by CURTIS, Ch. J.

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Appeal by defendant from an order denying a motion to set aside a verdict for \$1,000 in plaintiff's favor, on the ground that it was contrary to evidence, and that the damages were excessive. The exceptions were ordered to be heard in the first instance at the general term, and judgment in the meantime to be suspended.

The action was brought to recover damages for personal injuries, alleged by the plaintiff to have been inflicted upon him while a passenger in defendant's car, by an intoxicated person whom the conductor brought in from the front platform and seated inside of the car at the request of the driver, who told him that "he was not fit to ride there, he was too full." All the allegations of the complaint, except that defendant was a corporation operating the railroad, and that plaintiff was a passenger June 4, 1874, were denied by an answer, verified by defendant's president.

*John E. Burrill*, for defendant and appellant.

*E. Y. Bell*, for plaintiff and respondent.

BY THE COURT.—CURTIS, Ch. J.—The conductor and driver were the defendant's agents and servants, to take charge of the car while on the road, and to their judgment, care and skill, the conveyance and safety of the passengers in defendant's car was confided. As agents of the defendant, this duty should have been discharged by them with diligence, prudence and foresight. Where not only persons in business pursuits, but females, school children, and the aged and infirm are conveyed as passengers, the introduction into a car and seating among them by the conductor, of an intoxicated, quarrelsome, scratched, bloody, dirty, ragged man with his clothing unbuttoned in an indecent manner, is an offense against civilization, and unjustifiable, no matter how frequent may be its occur-



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Opinion of the Court, by CURTIS, Ch. J.

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rence. When such an act as this occurs at the request of the driver, and after a notice from the driver to the conductor, that a person of this description is not fit to ride on the front platform, that he is "too full," the want of care and judgment by the servants in discharging their duty for the protection and welfare of the passengers, is the more manifest and the more aggravated.

The evidence shows, that the plaintiff sustained the injuries of which he complains, from an unprovoked and aggravated assault, committed upon him by a drunken person of the description above referred to, who was introduced into the car, by the negligence and carelessness of the defendant's servants, who were in charge of the car. There is no ground to set aside the verdict, as contrary to evidence.

The defendant asks to have the verdict set aside also for excessiveness of damages. It appears the plaintiff was struck several very severe blows, with both fists, in the face and mouth, that his eyes were blackened, his teeth loosened, his lips cut open, his nose injured, and that he was rendered unable to eat meat and had to have his food mashed and could not swallow comfortably for ten days. In my opinion the verdict is not excessive. It is not even compensatory for the pain and suffering, resulting from injuries of the nature shown to have been sustained by the plaintiff. What reputable business man would consider himself compensated by the receipt of the amount of this verdict, for the suffering necessarily incident to an assault of this character? Its amount, perhaps, arose from the very proper instructions of the court, in his charge cautioning the jury against giving excessive damages. But the question of setting aside the verdict for inadequateness of damages is not before us, and it is unnecessary to consider this matter.

The plaintiff testified to a conversation between

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Opinion of the Court, by CURTIS, Ch. J.

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himself and the conductor after the assault, in which the conductor stated that the driver had told him "to take charge of this man; that he was afraid something would happen; that he was afraid he might be quarrelsome, or he might fall off the car, that he was not in a state to take care of himself."

The defendant excepted to the admission of the conversation. These statements of the conductor were not made at the time of the act, so as to constitute a part of the *res gestæ*, and as far as they are recitals of what the driver told him, are in the nature of hearsay evidence. In these respects they do not come within the rule where the statements and admissions of an agent or servant will bind the principal (*Luby v. Hudson River R. R. Co.*, 17 *N. Y.* 131), and should have been excluded.

The court refused to charge, as the defendant requested, that the case was not one in which punitive or exemplary damages should be awarded. The defendant excepted to this refusal, and the exception is tenable. The master is only answerable in damages for the mere negligence of his servant to the extent of compensation for the injury received. Though the actual instructions to the jury, in the charge on the subject of damages, may have led to a more favorable result for the defendant than if the court had complied with the defendant's request, yet such a result cannot necessarily be presumed; and it was the right of the defendant to have the legal measure of damages, in such a case, charged by the court (35 *N. Y.* 301; 53 *Id.* 28; 56 *Id.* 45; *Id.* 295; 67 *Id.* 103).

The exceptions should be allowed, and the verdict set aside and a new trial ordered, with costs to abide the event.

SANFORD, J., concurred.

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Statement of the Case.

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EDWARD HILSEN, PLAINTIFF AND APPELLANT,  
v. JAMES T. LIBBY, DEFENDANT AND RES-  
PONDENT.

TRADEMARK, AGREEMENT FOR THE USE THEREOF, FRAUD  
IN THE CONTRACT.

The principles of law applying to patents, and contracts of license of the same, and the payments of royalties thereupon, should be applied to registered trademarks, and therefore the defendant, as licensee of a registered trademark, is not in a position, while he holds the license and uses the trademark, to set up and maintain, in an action to recover the royalty or fees provided for in the license, the defense that the trademark is invalid.

However, if he was induced to enter into the contract by fraudulent representations he has a right to interpose that as a defense (*Sexton v. Dodge*, 57 *Barb.* 116; *Marston v. Sweet*, 66 *N. Y.* 212).

When a party pleads that he has been defrauded, he is bound to so aver it that his opponent shall have notice of it, and an opportunity to meet it. It is not to be gathered from vague and partial allegations and obscure inferences (See cases cited in the opinion of the court).

Before CURTIS, Ch. J., and SANFORD, J.

*Decided April 1, 1878.*

Appeal by the plaintiff to the general term from a judgment in favor of the defendant upon a demurrer to the answer.

The action is for an accounting under an agreement, which is made a part of the complaint, and which grants to the defendant the exclusive right to use a certain trademark registered in the United States patent-office August 10, 1876. In consideration of this license and privilege, the defendant covenants to

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Opinion of the Court, by CURTIS, Ch. J.

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pay certain royalties, to furnish statements, and to keep his books of account open for the plaintiff's inspection.

The answer admits the agreement, use of the trademark and refusal to pay, and sets up that the trademark was invalid, that the agreement was without consideration; and, further, that as an inducement to the defendant to enter into the agreement, the plaintiff stated and represented to him that he was the first to adopt and use the trademark, and was solely and exclusively entitled to such use, but that in fact it had been used previous to plaintiff's adoption thereof by Ward Brothers, and ever since, of which use the plaintiff had knowledge or information at the time of executing such agreement, and that such use diminished defendant's profits; and that the defendant executed the agreement relying upon such statements.

The plaintiff demurred to the answer as not stating facts constituting a defense to the action. The demurrer was overruled and judgment granted thereon in the defendant's favor, from which the plaintiff appeals.

*Walter S. Poor*, for appellant.

*Edmund Wetmore*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—Although it is held that the invalidity of a patent is a good defense to an action brought for the purchase-price of the same, on the ground of a failure of consideration, yet it is also held, that such invalidity is no defense to an action to recover license fees for the term the patent was actually used under the license (*Marston v. Sweet*, 66 N. Y. 212; *Bartlett v. Holbrook*, 1 Gray, 114; *Noton v. Brooks*, 7 Hurlst. & N. 497; *Chanter v. Dewhurst*, 12 Meeson & W. 823; *Lawes v. Purser*, 38 Law & Eq. 48).

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Opinion of the Court, by CURTIS, Ch. J.

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It is unjust that a licensee should profit by the use of a right under a license, which he concedes in his agreement to be valid, and covenants to defend, and then set up that the patent is void, in order to evade the payment of his license dues. It is his duty to offer to surrender the license, if he proposes to question the validity of the patent, and not seek to occupy a position where the patentee can neither sue him as an infringer, since he holds a license, or collect his dues without establishing the validity of his patent, the concession of which was perhaps one of the motives for granting the license.

There is no just reason why the same principle should not apply to registered trademarks. The United States statutes make provision for the transfers of the use of trademarks, and their passage by assignment is recognized by the courts (§ 2,947, *U. S. Stat. at L.* ; *Filkins v. Blackman*, 11 *Blatchf.* 440). The intention to adopt and use a trademark for exclusive use in the United States, entitles such trademark to registration and protection, the same as though it had been already in exclusive use (§ 4,937, *U. S. Stat. at L.*).

The defendant also urged at the argument that so far as relates to the invalidity or non-existence of the right conveyed by an assumed grant or license constituting a defense to an action brought to recover royalties reserved, or for the breach of any other covenants by the licensee or grantee, the agreement in suit does not differ from a license or conveyance under a patent-right.

Though the defendant, as licensee, is not in a position, while he holds the license and uses the trademark, to maintain the defense that the trademark is invalid, and that his agreement consequently was without consideration, yet if he was induced to enter into the contract by fraud, he has a right to interpose that as a

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Opinion of the Court, by CURTIS, Ch. J.

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defense (*Saxton v. Dodge*, 57 *Barb.* 116 ; *Marston v. Sweet*, 66 *N. Y.* 212).

By closely examining the various allegations in the answer, there may be gathered statements, substantially, that as an inducement to the defendant to enter into the contract, the plaintiff represented to him that he was the first to adopt and use the trademark, and was solely and exclusively entitled to such use, whereas in fact it had been used previous to plaintiff's adoption of it, by Ward Brothers, and ever since, of which use the plaintiff had knowledge or information at the time of executing the agreement, and that the plaintiff did not have such sole and exclusive use of the trademark, and that the defendant executed the agreement relying upon such statements.

The question arises, whether this states sufficient facts to constitute the defense of fraud. It will be observed that three things are omitted in the answer that are commonly regarded as essential elements of fraud. It does not allege that the plaintiff made the representations with intent to deceive, or that the defendant was deceived by them, or that the defendant entered into the agreement believing them to be true.

It is argued, on the part of the defendant, that where the action is not brought to recover damages for fraud, and the fraud is merely alleged to avoid a contract by way of defense, it is unnecessary to allege fraudulent intent. There is no principle that creates any distinction where a party pleads that he has been defrauded, whether he pleads it as a plaintiff or a defendant. He is bound to so aver it, that his opponent shall have notice of it and an opportunity to meet it. It is not to be fished out from vague and partial allegations and obscure inferences. This principle should be maintained, when fraud is pleaded, as necessary for the public protection (*Addington v. Allen*, 11 *Wend.* 374 ; *Leffler v. Field*, 52 *N. Y.* 621 ; *Ross v. Titterton*, 6

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Statement of the Case.

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*Hun*, 280 ; *Marsh v. Falker*, 40 *N. Y.* 565 ; *Hubbel v. Meigs*, 50 *N. Y.* 489).

The answer of the defendant, in consequence of these omissions to state facts that are held essential to constitute the defense of fraud, is defective, and for the reasons stated cannot be sustained.

The judgment appealed from should be reversed with costs, and the plaintiff have judgment on the demurrer with costs, with leave to the defendant to amend the answer on payment of such costs, and of the costs of reversal.

SANFORD, J., concurred.

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SAMUEL JOYNSON, PLAINTIFF AND RESPONDENT,  
v. CHARLES B. RICHARD' AND EMANUEL  
BOAS, DEFENDANTS AND APPELLANTS.

PRINCIPAL AND AGENT.

The general rule is that if an agent, in the course of his agency, signs a bill in his own name, he is liable, and his principal is not (*Rogers v. Coit*, 6 *Hill*, 822 ; *Crocker v. Colwell*, 59 *N. Y.* 218).

Section 2, page 768, 1 *R. S.*,—which provides that “every note signed by the agent of any person under a general or special authority, shall bind such person,”—refers to a note which upon its face appears to have been signed by an agent, and does not refer to a note so signed by an agent that, under the general rule, he becomes liable.

The case of *Engh v. Greenebaum* (2 *Hun*, 136), must be read and considered with reference to the facts of the case. It holds a defendant liable as a principal upon a bill signed by the agent personally, yet within his authority as an agent, and that a violation by an agent of private instructions given to him by his

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Statement of the Case.

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principal, does not absolve a principal from his responsibility, provided the act of the agent is within his authority.

In this case, if the defendants received the money to be transmitted to Liverpool, for the use of the holder of the bill—that is, to put the drawer in funds to pay the bill; the holder could recover of the defendants if they did not transmit the money. On examination and consideration of the testimony in the case, the court held that it did not appear that the money was so received, and the judgment was reversed on that ground.

Before SEDGWICK and FREEDMAN, JJ.

*Decided April 1, 1878.*

Appeal from a judgment entered upon decision by judge, a jury trial having been waived.

The complaint was to recover \$2,900, had and received by defendants to plaintiff's use. It also charged the defendants, as drawees of the bill of exchange hereafter referred to. It also claimed judgment upon a statement of facts sufficiently referred to hereafter.

The defendants were bankers in New York. One Creagh did business in Boston. The defendants sent to Creagh forms of bills of exchange, advice-sheets, and lists of bankers in Europe. They were to be used by Creagh in Boston. By accompanying letter the defendants wrote: "Arrangements have been made with our European correspondents to honor all drafts sent by our correspondents here, when advised by us. We would respectfully request you to report and remit promptly."

A book, sent with the blank drafts, stated the mode in which business was to be done, and contained the following: "It is to be understood, you draw these drafts for your own account as principal, and in no case to sign our firm. We only acting as agents for the transmission of the funds, guaranteeing, however, the prompt payment of all your orders, if properly advised and entered with remittance, par in New York."



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The course of business was to be that Creagh should sell bills on bankers in foreign parts. They were to be in form like the one sold to this plaintiff, and hereafter set out. Creagh was to send the advice-sheet to defendants, to inform them what bills had been sold, and was at same time to remit to defendants a certain amount, and thereupon the defendants were to cause the bills to be paid by the drawees upon presentation.

Before August 17, the defendants had protected bills, which Creagh had drawn, and of which he had advised them, without receiving accompanying remittances. On that day, they wrote to Creagh, asking him to pay the then indebtedness, excepting \$500, and informed him that thereafter they could give him no greater credit than \$500. On August 20, Creagh was indebted to the defendants in \$5,000, about, for bills protected by defendants without remittances from Creagh. About 2 p. m. of August 20, the plaintiff bought at Creagh's office the following bill :

MERRICK S. CREAGH,  
102 State Street, Boston.

"BOSTON, August 20, 1875.

"On demand of this sole bill of exchange, pay to the order of Samuel Joynson, five hundred and nineteen pounds sterling, value received, and charge to account C. B. R. & B.

"M. S. CREAGH.

"To EDWARD W. YATES & Co.,

"37 Castle Street,

"Liverpool, England.

"No. 51,328."

The plaintiff paid a clerk of Creagh, \$2,900. The whole business was done by the clerk, Creagh not being in his office. The clerk forthwith deposited the \$2,900 in Creagh's bank account. The same afternoon, the clerk mailed to the defendants the following advice-sheet :

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"BOSTON, August 20, 1875.

"MESSRS. C. B. RICHARD & BOAS, NEW YORK.

"The following drafts have been issued, which you will please protect :

Number.	Denomination of For. Money.	Amount of Foreign Money.	Rate.	Amount of U. S. Money.	Drawn to order of.	Drawn on.	Remarks.
1,220	£	4	4.92½		Cath. Enwright	Dublin.	
B 23,265		.10			James Rowan	London.	
" 25,578		4			Mrs. Mary Morony	Dublin.	

[Then follow statements of thirty-five other drafts.]

51,327		71.4	4.9½		Elizabeth Fell	Liverpool	Please advise by first mail.
51,328		519.			Samuel Joynson		
		698.16		3435.68	Gold at 118½	\$4,143.20	
					Refund,	89.25	
						\$4,108.15	Check to-morrow.

"E. E., August 20, 1875.

M. S. CREAGH,

Per G. J. G."

Creagh lived out of Boston, and wrote from his place, some time in the course of August 20, to the clerk to draw from the bank all but \$500, and deposit it in a bank to the credit of a New York bank on account of the defendants. This letter reached the clerk on the morning of the 21st. He forthwith drew from the bank a sum of \$5,000, and deposited it as directed by Creagh. Further facts on this point are stated in the opinion.

The defendants received on August 21, the advice-sheet and information by telegraph of the deposit of \$5,000. Including the amount stated by the advice-sheet, the indebtedness of Creagh to defendant was

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Opinion of the Court, by SEDGWICK, J.

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about \$9,000. The defendants applied the \$5,000 to the former indebtedness, so as to extinguish that and leave a balance which might be applied to protecting the bills of the advice-sheet, but not enough to protect the plaintiff's bill. This balance they thereupon applied to the protection of sundry small bills, that were first on the advice-sheet.

The plaintiff presented his bill, payment was refused, and this action was brought.

The court found that the defendants were liable, on the ground that Creagh had remitted the money to defendant, for the specific protection of the bill bought by plaintiff.

*Edward Salomon*, for appellants.

*R. B. Gwillim*, for respondent.

BY THE COURT.—SEDGWICK, J.—The general rule is that if an agent in the course of his agency sign a bill in his own name, he is liable on it, and the principal is not liable (*Rogers v. Coit*, 6 *Hill*, 322; *Crocker v. Colwell*, 46 *N. Y.* 212). It is not inconsistent with this rule, that where a partnership does business in the name of one of the partners, and in the course of the business, that partner signs a note in his own name, all the partners are liable on the note (*Bank of Rochester v. Monteith*, 1 *Den.* 405).

I understand that section 2, p. 768, 1 *R. S.*,—*i. e.*, “every note signed by the agent of any person under a general or special authority shall bind such person,”—means a note that on its face shows it is signed by an agent, and does not mean a note whereon the agent is personally liable.

The opinion in *Engl v. Greenebaum* (2 *Hun*, 136), must be read with reference to the facts of the case. The opinion holds the defendant liable as a principal

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upon a bill signed by the agent personally, and says that a violation of private instructions given to an agent will not absolve a principal from responsibility, provided the act of the agent is within the authority. The facts in proof showed that the business done by the agent was Greenebaum's business, and the latter meant it should be done in the agent's name. When the agent received the consideration of the bill, by construction of law Greenebaum received it, and therefore Greenebaum was liable to refund that consideration (*Allen v. Coit*, 6 *Hill*, 318), although technically he might not be liable on the bill.

I am of opinion that in the present case, the testimony proved that the business done by Creagh was his own business, and was not the defendant's. Creagh, in drawing the bills, did not act as defendant's agent. All the liability that the defendants incurred from their dealings with Creagh, depended upon a special contract between them, which was, in substance, that upon the defendants receiving funds to correspond in amount with the bills to be protected, they would protect the bills. The defendants would not be liable on the consideration of a bill, simply because it had been paid to Creagh.

On the argument it was not denied that if the defendants received from Creagh, money to be transmitted to Liverpool, for the use of the holder of the bill, that is, to put the drawee in funds to pay the bill, the holder has an action if the defendants did not transmit the money.

The testimony must be examined to see if Creagh did pay to the defendants, money to be used for the protection of the bill brought by the plaintiff. The claim is that Creagh sent to the defendants a certain sum of \$5,000, to be applied to protect the plaintiff's bill with others. No special instructions were sent with the \$5,000, but it is claimed that the defendants

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Opinion of the Court, by SEDGWICK, J.

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received that sum contemporaneously with the advice sheet, that had opposite the statement of plaintiff's bill, the words, "Please advise by first mail," and that this is tantamount to a direction to apply the money to that draft.

The defendant's claim that before the advice-sheet was received, they had required Creagh to reduce his indebtedness to them to \$500, and to keep it so reduced, and that the \$5,000 was sent in answer to this requirement.

There is no doubt that Creagh would not have had the means of drawing the \$5,000, if the money paid by plaintiff had not been deposited in Creagh's bank. But immediately upon Creagh's receiving the money from plaintiff, it became Creagh's money. Creagh could use it as his own and give to it any direction that any owner could. His duty to the plaintiff was clear, but his power of disposition was absolute (*Shepard v. Steele*, 43 *N. Y.* 60). The fact, that Creagh had received the plaintiff's money has still less force, when it appears that the defendants did not know what the fact was. Creagh's excuse for not remitting regularly was that his agents had not sent him the money for the bills they had sold. For all the defendants knew, the plaintiff's bill might have been one of these.

Unless Creagh, in remitting the money to the defendants, limited its application, they had the right to apply it to the former indebtedness, as in fact they did. And the plaintiff, to entitle himself to judgment, was to show by a preponderance of testimony that under the general contract between Creagh and the defendants, the payment of the \$5,000 was the performance of the condition on Creagh's part, which made the contract operate specially in favor of the plaintiff as the holder of the bill; that is, that it was paid by Creagh to protect, among other bills, the one

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bought by plaintiff. It was not enough that it was Creagh's duty to limit the use, or that Creagh had an intention, not disclosed to defendants, to limit it; or even that defendants knew that Creagh had received and deposited the money paid by the plaintiff (*Shepard v. Steele, supra*). If he did not communicate such an intention, or if the circumstances themselves did not show that such was his intention, the defendants' right to apply the money where they saw fit prevailed (*Manning v. Western, 2 Vern. 603; Stone v. Seymour, 15 Wend. 19*).

On August 20, the plaintiff bought the bill and paid \$2,900. All the business was done, and the money deposited on that day by a clerk of Creagh. Another clerk made up and mailed the advice-sheet after 2 o'clock of that day, and of course then wrote, against plaintiff's bill: "Please advise by first mail." The next morning the first-mentioned clerk drew from the bank where he had deposited the money paid by plaintiff \$5,000, leaving a balance of about \$300. The check on which he drew the \$5,000, was one of a number signed in blank and left with him by Creagh. He placed the \$5,000 in the Suffolk Bank in Boston, to the credit of the German-American Bank in New York, for account of the defendants, and sent information of this to defendants by telegraph.

Before the information and the advice-sheet reached defendants on the 21st, Creagh was indebted to them between \$4,000 and \$5,000; nevertheless, as the advice-sheet had requested that plaintiff's draft be advised at once by mail, and at the same time saying the check would be sent on the 21st, there would, on these facts, only be room for an argument that the deposit of \$5,000 was meant to be that check.

Such a conclusion would, however, disregard two controlling facts not yet mentioned. The first is, that on August 17, the defendants had written a letter re-

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Opinion of the Court, by SEDGWICK, J.

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quiring Creagh to reduce his indebtedness to them to \$500, and there is no proof that any communication in response had come from Creagh, before the 21st. The next is, that whatever had been the clerk's intention on the 20th, in writing on the advice-sheet "check tomorrow," the fact was his deposit of \$5,000 on the 21st was not made in pursuance of that intention. The proof was clear from himself, that he made it in obedience to a letter that had been written by Creagh on the 20th, at his place, a few miles from Boston. The clerk at one time said that this letter was written by Creagh after he had left his office on the 20th. This was immediately corrected by the witness saying that he did not know that Creagh was at his office at all on the 20th. Indeed, so far as the proof went, there was nothing to show (but the contrary was to be inferred) that Creagh had any knowledge at all of the plaintiff's purchase or payment. It is, therefore, impossible to find it to be the fact, that the advice-sheet written by the clerk was meant by him or by Creagh, to refer to the deposit. The defendants were justified in considering, in accordance with the fact, that the deposit was made in response to their demand for a reduction of the first indebtedness.

On this last point, there was evidence that the defendants believed that the deposit was made in response to a demand of them, made by telegraph on the 21st; but the inferences to be drawn from the letter in which this appears are not unfavorable to the defendants. That letter was written, as its contents show, after the defendants had received the advice-sheet and information of the deposit. This letter said:

"We telegraphed you to-day, approximate balance of \$9,000" (which included the amount of the advice-sheet) "must be paid to Suffolk National Bank, for account of German-American Bank, immediately after the receipt of this telegram; and we are informed that

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Opinion of the Court, by SEDGWICK, J.

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you have deposited with the Suffolk Bank \$5,000 to our credit. This amount is totally insufficient to cover your indebtedness, and we have to request that you will at once pay to the Suffolk Bank, for our credit in the German-American Bank, \$4,000.”

If the conclusions from the testimony given on behalf of plaintiff, be not correct this letter would show that the deposit was made, not as accompanying the advice-sheet, but to meet a demand on general account made by the defendants.

If the deposit of \$5,000 had been large enough to pay off the indebtedness that existed, irrespective of the advice-sheet, and to leave some funds to be applied to the drafts specified in the sheet, large enough to protect plaintiff's bill, it might be a question whether it was not defendant's duty to make that application of the balance. The plaintiff should have proved what was necessary to such a case. The defendants proved that after applying to the general indebtedness the \$5,000 there was not enough to protect plaintiff's bill. It would seem that, with the balance and some funds afterwards remitted by Creagh, the defendants protected other bills to a greater amount than £579. But the case was made to turn solely upon the way in which the \$5,000 was to be applied by defendants.

After the defendants had applied the \$5,000 to the general account, Creagh claimed that the remittance of \$5,000 was sent by him to be used for plaintiff's bill; but this claim did not alter the former facts which, at the time, fixed defendants' rights.

I am, therefore, of opinion that the judgment should be reversed, on the ground that it was not shown that the \$5,000 was remitted for the benefit of the plaintiff.

Judgment reversed, with costs to appellant to abide event, and new trial ordered.

FREEDMAN, J., concurred.



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**Statement of the Case.**

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**JOHN S. ROSS, PLAINTIFF AND RESPONDENT, v.  
ELIZABETH HARDEN, AS ADMINISTRATRIX,  
&C., AND AMOS H. TROWBRIDGE, AS AD-  
MINISTRATOR, &C., DEFENDANTS AND APPEL-  
LANTS.**

**EXECUTORS AND ADMINISTRATORS.**

Contracts of executors and administrators, although made in the interest, and for the benefit of the estate they represent, if made upon a new and independent consideration, moving between their promisee and themselves, are their personal contracts, and do not bind the estate (*Austin v. Munro*, 47 *N. Y.* 360; *Ferrin v. Myrick*, 41 *Id.* 315; *Cary v. Gregory*, 38 *N. Y. Super. Ct.* 127; and *Ross v. Harden*, 42 *Id.* 427).

If, however, a valid contract was in fact made by the plaintiff with the deceased, the action can be maintained in its present form, and it can be averred in one count or statement of the cause of action (as in the complaint in this action), that both the intestate, and his representatives promised to pay (*Benjamin v. Taylor*, 12 *Barb.* 328; *Ross v. Harden*, cited above).

In any case, a contract must be valid as between the parties to it, and must be supported by a good and sufficient consideration as between them, in order to be sustained and enforced between their legal representatives, or between either of them and the legal representatives of the other. No contract can bind the legal representatives of a deceased person, that was not valid and binding upon that person at the time it was made. So, if a contract be invalid and void, as being against good morals, or in conflict with the established policy of law, neither the parties to it nor their respective executors or administrators acquire any rights, or incur any liabilities under or by virtue of the same.

A contract such as is alleged in the complaint in this case as having been made between the plaintiff and defendant's intestate, is void as between the parties to it, for want of consideration and mutuality, and as conflicting with the settled policy of the law which governs and controls the transmission and devolution of the estates of deceased persons, and the custody of such estates, upon and after the decease of their original owners (See the opinion of the court).

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*Held*, also, that the evidence does not establish the making of such a contract as is alleged in the complaint, and that the motion of defendants for a dismissal on these grounds should have been granted, and the exception to the denial thereof was well taken (See the opinion of the court, SANFORD, J., for a review of the facts, and the law applicable thereto, and the exceptions to the charge of the judge to the jury on the trial of the case).

*Held*, also, that the intestate's meaning, in giving his instructions as to the disposition of the property, should have been *distinctly* submitted to the jury as a question of fact, and also that, in any aspect of the case the verdict was excessive.

Before CURTIS, Ch. J., SANFORD, and FREEDMAN, JJ.

*Decided April 1, 1878.*

Appeal from a judgment rendered on a verdict in favor of the plaintiff, and also from an order denying defendants' motion, made on the judge's minutes, that the verdict be set aside and a new trial granted.

The action was brought to recover \$10,000, as the reasonable value of services alleged to have been rendered by the plaintiff, in and about the custody, preservation, and safe keeping of the personal property of defendants' intestate, after his decease.

The cause has been twice tried.

At the first trial, the jury rendered a verdict in favor of the plaintiff for \$8,476.80.

Exceptions then taken by defendants were heard in the first instance at general term, in May, 1877, and were sustained. The verdict was set aside and a new trial ordered, on the ground that the plaintiff had been erroneously examined as a witness in his own behalf, in regard to a personal transaction between himself and the defendants' intestate (40 *N. Y. Superior Ct.* [10 *J. & S.*] 427).

A second trial, in June, 1877, resulted in a verdict in favor of the plaintiff for \$9,862.50, upon which judgment was entered for \$10,414.72.

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Opinion of the Court, by SANFORD, J.

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The defendants moved for a new trial on the minutes, on the ground that the verdict was against the evidence, and excessive in amount.

The motion was denied.

Defendants appeal both from the judgment and the order denying their motion.

*John E. Burrill*, for appellant.

*George W. Lord*, for respondent.

BY THE COURT.—SANFORD, J.—The complaint alleges that the services of the plaintiff, for which he seeks compensation, were rendered in and about the custody and preservation of the estate of defendants' intestate, after his decease, but at his request as well as at theirs; and that they, in their capacity of administrator and administratrix, promised to pay him therefor. If such services were rendered at the request of the defendants, and not at that of their intestate, the action should have been brought against them in their individual, and not in their representative capacity. For, as was well observed by FREEDMAN, J., when this case was formerly before the court, contracts of executors and administrators, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, moving between their promisee and themselves, are their personal contracts and do not bind the estate (citing *Austin v. Munro*, 47 *N. Y.* 360; *Ferrin v. Myrick*, 41 *Id.* 315; *Cary v. Gregory*, 38 *N. Y. Superior Ct.* 127).

If, however, a valid contract was, in fact, made with the plaintiff by the deceased, the action may be maintained in its present form, and it may be averred in one count or statement of the cause of action, that both the intestate and his personal representatives promised to pay (*Benjamin v. Taylor*, 12 *Barb.* 328). There is,

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however, no authority for joining a cause of action founded upon the contract of an intestate with one founded upon the contract of his personal representatives. In the case last cited, but one contract was set forth, and that was with the testator. No contract with the executor was alleged. Here the averment is that plaintiff's services were performed at the request both of the intestate and of the defendants, and that both promised to pay for them. There was, therefore, a misjoinder of alleged causes of action, assuming that a cause of action founded upon a valid contract of the intestate is sufficiently set forth.

At the trial no evidence was offered tending to show either a request or promise, made by or on behalf of the defendants or either of them ; and the plaintiff relied solely on the promise, which he claimed as an implication of law, that the defendants would pay for services rendered their intestate's estate after his decease, upon his request made in his lifetime.

The recovery, therefore, is to be sustained, if at all, upon the theory, that one may bind his legal representatives for a consideration not moving to himself, but to them, and, by a contract, which in its nature and by its terms, is not susceptible of performance by, or of enforcement against, himself ; and upon the further theory, that one may delegate to a person or persons, other than those whom the law designates for that purpose, the care, custody and safe keeping of his property after death, not by last will and testament, executed in the manner and with the solemnities prescribed by law, but informally and by mere word of mouth.

The general principle, doubtless, is that for any cause of action arising upon a contract valid in its inception as against the contractor, suit may be maintained against his executor or administrator, irrespective of the question whether such cause of action

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Opinion of the Court, by SANFORD, J.

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actually accrued and became susceptible of enforcement in his lifetime, or not until after his decease.

But contracts may be made upon which no cause of action can arise against the personal representatives of the contractor after his decease. As, for instance, where the contract is purely personal to the deceased, and can, of necessity, be performed according to the intentions of the parties by no one else. The case of an author, who undertakes to write a specified literary work ; or of a musical composer, who agrees to compose an opera or oratorio ; or of an artist, who promises to paint a portrait, affords an apt and pertinent illustration. In each of these cases the undertaking is personal to the contractor, and can be performed, within the intent of the parties, by no one else. The legal maxim "*actio personalis moritur cum persona*," is in such case to be invoked and applied. But, in any case, a contract must be valid as between the parties to it, and must be supported by a good and sufficient consideration, as between them, in order to be sustained and to be susceptible of enforcement between their legal representatives, or between either of them, and the legal representatives of the other, as no contract can bind the legal representatives of a deceased person, which is not valid and binding upon himself. A contract founded upon an illegal consideration, or supported by no consideration whatever, would bind neither the parties to it nor their legal representatives.

So, if a contract be void as against good morals, or as in conflict with the established policy of law, it can be enforced by neither of the parties to it ; and their respective executors or administrators acquire no rights and incur no liabilities under or by value of it. I am of opinion, that a contract such as is alleged in the complaint as having been made between the plaintiff and defendant's intestate is void, as between the parties to it, for want of consideration and mutuality ;

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and also as conflicting with the settled policy of the law which governs and controls the transmission and devolution of the estates of deceased persons, and the custody and control of such estates upon and after the decease of their original owners. The power of directing, within certain limits, what disposition shall be made of his property after his decease, is accorded by the sovereign power, the people, to every person of suitable age and of sound mind and memory (2 R. S. 60). But that power must be exercised by will, in writing, and not otherwise, excepting in the case of soldiers in actual military service, and mariners at sea. And every last will and testament must be executed and attested as the law prescribes, or it will have no force or validity whatsoever. According to the older authorities of the ecclesiastical law, the appointment of an executor was essential to a testament, and was said to be its substance, head, true formal cause, and very foundation (*Williams on Executors*,\* 7). Indeed, the common law judges laid down the rule, in *Woodward v. Lord Darcy* (*Plowd.* 185), that "without an executor a will is null and void."

That rule was long since abrogated, and a will may now appropriate the testator's estate, and apportion it among the objects of his bounty, without specifying the particular individual who shall assume the duty of executing it. On the other hand, the mere nomination of an executor, without legacy or bequest, or direction as to which disposition he shall make of the estate, is sufficient to constitute a will, and, as a will, such nomination must be probated (*Williams on Executors*,\* 124). But in all cases where the custodian of the estate is not nominated by will, the law reserves to itself the right and power of appointment, and charges any one who intermeddles with the goods of the deceased as for a trespass or tortious act, committed in his own wrong. Such intermeddlers or intruders

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Opinion of the Court, by SANFORD, J.

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were formerly known and dealt with, as executors *de son tort*; but that office or function is now abolished in this State, by statute. Any person, however, who takes, receives or interferes with the property or effects of a deceased person, is regarded as a trespasser, and is responsible, as such, for the value of the property or effects so taken or received, and for all damages caused by his acts to the estate (2 R. S. 449, § 17).

There are acts which a stranger may perform without subjecting himself to the hazards of such tortious liability,—such as locking up the goods for preservation, directing the funeral and defraying its expenses out of the effects of the decease, feeding his cattle, or providing necessaries for his children,—for these, it is said, are offices of kindness and charity. Any assumption of exclusive authority, control, or right of disposition, however, is a trespass, and may be treated as such by an executor, or general or special administrator, when qualified, notwithstanding the pretext of a license, power of attorney, or special request from the decedent in his lifetime. At the moment of death, *eo instanti*, the legal title to personalty vests, by operation of law, in the personal representatives of the deceased. Letters testamentary and of administration relate back from the date of their issue, to the date of the death of the testator or intestate, and no one claiming to act as the agent or attorney of a deceased person can demand or retain personal assets by a right paramount to that conferred by such letters.

It was conceded on the argument that the plaintiff could not have retained possession of the deceased's box of securities for an hour, after demand from the defendants, when once their title was established by their letters of administration. And yet, as will shortly appear, the contract, if such it can be called, between the plaintiff and their intestate, authorized and required him to retain the control of the property, not merely



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until it should be demanded by them, but until one James Gray should arrive from Ireland. And the principle upon which the contract is to be maintained, if at all, would, as it seems to me, sanction and sustain an arrangement whereby the legal rights and powers of executors and administrators would be subordinated to the instructions of their testator or intestate, orally imparted to a stranger. The contract now in question, if it meant that anything should be done after the death of the intestate, meant that the plaintiff should retain the control of the defendants' property, not merely until the defendants should demand its delivery, but until a contingency should occur, which might be in the remote future, and indeed, which might never occur at all. It is manifest that the defendants were under no obligation to accede to the terms, or to permit the performance of any such contract as that; nor can I perceive any good ground upon which they should be required to recognize or respect it at all. It lacked at least one of the essential elements which underlie the validity of all contracts. It was without mutuality, and as between the parties to it, no consideration moved from either to the other. The intestate might equally well have instructed the plaintiff to purchase or sell property for account of his estate, after his decease, and the plaintiff's promise to do so, would, on the same principle, have raised an implied promise on the part of the defendants to abide by his action and compensate him therefor.

But the evidence in the case does not, in my judgment, establish the making of any such contract between the plaintiff and the defendants' intestate, as that alleged in the complaint; nor any request on the part of said intestate for the rendition of any service to be performed after his decease.

It appeared at the trial that, on March 4, 1872, the plaintiff, who was then, and for eleven years had been,



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the confidential clerk of defendants' intestate, and, as such, entrusted not only with the possession, care and custody of his securities, but, to a large extent, with their legal title and apparent ownership, brought to the house of said intestate from its accustomed place of deposit, in the vault of the Bank of the State of New York, the tin box in which his securities, consisting of bonds, railroad stocks, mining stocks, &c., &c., were usually kept. The plaintiff, in his capacity of clerk, had repeatedly had the care and custody of the box before, and had previously taken charge of these securities. They had been entrusted to his care for weeks at a time. He was the only clerk of the intestate; he did all his business; he had always been the custodian of the box in transferring it to and from the bank. The value of the securities in the box was about \$1,200,000. A large portion of them then stood in the name of the plaintiff, and were transferable by him. When the box was brought up, defendants' intestate had the key. He opened it, told the plaintiff to separate the securities to the extent of \$500,000, and to get another box and put James Gray's securities in it. Plaintiff did separate the securities as directed, under the supervision of his employer, who specified which securities were to go to James Gray. After the separation was effected, under the supervision of the intestate, all the securities were put back into the box. Intestate locked it, handed the key to the plaintiff, and "told him to take charge of the box and to put it in the Safe Deposit Company, until James Gray arrived from Ireland."

This is all that was said on the subject. There was no reference to the condition of intestate as at all precarious in respect to the contingencies of life and death; nothing to indicate that he did not himself expect to survive until the contingency of Gray's arrival should occur. These words alone constitute the re-

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quest, upon which, as the plaintiff insists, a promise on the part of the defendants is in law to be implied that they would compensate him for services to be rendered in and about the care, custody and preservation of their intestate's estate after his decease.

This interview occurred on March 4, 1872. Intestate was in fact in a low condition of health at the time, though evidently capable of attending to business.

He died, two days afterwards, March 6, 1872. The box remained at his house until his death. The plaintiff then took possession of it; removed it to his own house, it being too late to take it to the Safe Deposit Company on that day. The next day he carried it back to the house of the deceased, but, subsequently, between one and two o'clock, took it down to the Safe Deposit Company and put it in there; hired a safe, and put the box in with its contents. It remained there from March 8 to March 14, when it was handed over to the defendants, who had then qualified as the legal representatives of its deceased owner.

Upon this state of facts, as disclosed by the evidence, a motion was made for the dismissal of the complaint, as well on the ground that the averments of the complaint in respect to the employment of the plaintiff by the deceased were not sustained by the proof, as upon the ground already considered, viz., that it was not competent for the decedent to enter into a contract with the plaintiff for the care and custody of his estate from and after his decease.

I am of opinion that the motion should have been granted, and that the exception to its denial was well taken, on both the grounds urged.

The same question, however, substantially, was again presented by exceptions taken to the charge of the court, and to his refusal to charge as requested; and it will perhaps be more convenient to consider the evidence, as bearing upon the question of a contract,

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in connection both with the charge and with the ruling of the court in refusing to dismiss the complaint.

After evidence had been adduced on the part of the defense, relating mainly to the value of the plaintiff's alleged services, the court charged, in effect, among other things, that if defendant's intestate, in view of his situation and for the purpose of taking proper steps to secure his estate, called on the plaintiff to take charge of his estate, *at his death*, and he did take charge of it, he is entitled to compensation for the risk, although previously employed at a moderate salary ; for the contract with respect to such previous employment ceased with the life of the intestate ; and it is precisely at that point of this case that the new contract arises.

He further charged, that when the plaintiff took charge of the box, services were rendered which entitled him to compensation, and that the question whether there was a contract must be answered adversely to the defendants. To these portions of the charge exception was taken, and the defendants also excepted to the refusal of the court to charge, as requested, that the contract as testified to terminated at the death of the intestate. In response to such request the court had charged that the contract commenced on the death of the intestate, to which proposition exception was also taken.

These exceptions, in connection with that taken at the close of the plaintiff's case to the refusal of the court to dismiss the complaint, clearly raise the question whether any promise on the part of the defendants or their intestate, that the plaintiff should receive compensation for services to be performed in and about the custody of his estate after his decease, can be implied from what occurred at the interview between them on March 4.

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There being no conflict of evidence as to what occurred on that occasion, the question would seem to be one for the court and not for the jury, though it is not entirely clear that the learned judge at the trial so regarded it. A portion of the charge indicates that he at first proposed to submit to the jury, the question whether or not the intestate, in view of his situation, and for the purpose of taking steps to secure his estate, called on the plaintiff to take charge of the box, at his death. The fair purport of the charge, however, taken as a whole, is such that it must be deemed to withdraw from the jury, this, and all other questions, except that of the value of the services rendered by the plaintiff and the amount of the compensation to which he was entitled, for the jury were distinctly instructed that the question raised by the counsel for the defendants, as to whether or not there was a contract, must be answered against his view; and they were as distinctly charged, that when the plaintiff took charge of the box, services were rendered, for which he was entitled to compensation. Defendants' counsel requested the court to charge, that in order to entitle the plaintiff to recover, the jury must be satisfied that it was the intention of the intestate to enter into a new and independent contract, and that the direction given to him was not intended to be given in the course of his existing employment. To this request the court responded as follows: "I have already said that it was for them to say what he intended." To the refusal of the court to charge as requested, defendants' counsel excepted. As already intimated, I am of opinion that in the absence of conflict or contradiction in regard to the facts of the case, the question, whether the defendants' intestate is to be deemed to have requested the plaintiff to perform services for his estate, after his decease, and also whether any promise to compensate the plaintiff therefor is to be im-

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plied from such request, if made, are questions of law. Upon these questions the case was the same when the plaintiff rested and the motion for non-suit was made, as when finally submitted to the jury.

If the facts are not such as to warrant the inference, that in directing his clerk to deposit his box in the Safe Deposit Company, the intestate contemplated a service the performance of which was not to be immediate, but which was only to be contingent upon and to follow after his death, the complaint should have been dismissed. For it cannot be doubted that the transfer of the box to and from its appropriate place of deposit, and its care and custody during such transfer, were within the scope of the plaintiff's existing employment, and were among the regular and accustomed duties which he was most frequently required to perform.

There was nothing in the language of the intestate to indicate that he contemplated the retention of the box at his place of residence during the remainder of his life ; and nothing in the evidence, save the fact that he did die two days afterwards, tends to show that he was *in extremis*, or that he apprehended his own immediate demise. Indeed, his expressed purpose of having the box remain in the Safe Deposit Company until Gray should arrive, would indicate that he expected to survive that event,—since he must be presumed to have known that in the event of his death, it would be the right and the duty of his legal representatives to take it into their possession,—and to dispose of its contents in due course of administration. It would have been altogether at variance with the habitual prudence and caution that had previously characterized the action of both the plaintiff and his employer, that a tin box, susceptible of easy demolition or depredation, and containing over a million of dollars in securities, largely negotiable, should be left

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lying around for an indefinite period, or should not, at once, be consigned according to their established usage, to some safe depository. And, therefore, it seems incredible that the direction given to the plaintiff could import a purpose to defer such consignment, during the then uncertain period of the intestate's life, or could have any other than a present and immediate significance and effect. The words used are clearly susceptible of a construction which would give them immediate effect. They were such as the intestate would, naturally, have used, had he contemplated and designed an immediate deposit of the box in the Safe Deposit Company, irrespective of any question of his life or death. I think it would be doing violence to their ordinary and true import and significance to interpolate among them any such expression as "after my death," or equivalent phraseology.

The policy of the law regards with extreme solicitude and suspicion any parol disposition of property *causa mortis*; and particularly where such disposition is to take effect only in case of, and after death. If any valid disposition of it, even with respect to its care and custody, can be effectively made, otherwise than by the observance of those testamentary attestations which the statute of wills requires, the purpose and intention of the owner should be established by the clearest and most indubitable evidence, and without any resort to conjecture or surmise. In the present case the alleged purpose of the intestate to devolve upon the plaintiff, the care and custody of his property upon his death and thereafter, rests only in conjecture and surmise. Indeed, in my opinion, the evidence so clearly indicates the intestate's purpose that immediate action should be taken with respect to the deposit of the box in the Safe Deposit Company, while he lived, as to withdraw his intention in that regard from the

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realm of conjecture, and to fix it within the bounds of reasonable certainty.

If such was the import of the intestate's direction to the plaintiff, the duty devolved upon him was within the scope of his existing employment, and its performance entitled him to no compensation in excess of that thereby provided.

Entertaining no doubt that such is the only construction which can be given to the language used, I am of opinion that the complaint should have been dismissed on this ground, as well as on that first considered; but if the matter be doubtful, the defendants were at least entitled to have the question of their intestate's meaning fairly and distinctly submitted to the jury, substantially in accordance with the terms of their request. I do not think this was done. The question of intestate's meaning, if it can be deemed to have been submitted to the jury at all, by the learned judge in his charge as delivered, was in effect predetermined by specific instructions as to the law of the case, by which such submission was accompanied or followed. For the learned judge instructed the jury, as matter of law, that the question of contract or no contract, "raised by the learned counsel for the defendant, must be answered against his view of that question." It can hardly be asserted that a question of fact is submitted to a jury for their determination when they are at the same time instructed how, as matter of law, that question "must be answered." The charge, throughout, assumed that there must be a recovery in favor of the plaintiff. "When Mr. Ross, therefore, took possession of the box," the learned judge observed, "there were services rendered, for which I must say to you he was entitled to compensation." Again, he added, "It is true enough that what Mr. Ross did may be summed up as having been done in a few hours, but after all, he is entitled to compensation." Still again, he remarked,



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“You should give what he is entitled to for the discharge of this sacred trust, which was put into his hands, and for the fidelity with which he discharged it.” Finally, after discussing at considerable length, the nature of that trust and the great responsibility involved in its execution, the court leaves the case to their consideration, in the assurance that they will be able to reach a decision “as to the proper amount which should be rendered.”

At a still later stage of the case, when requested to charge specifically that the contract terminated upon the death of the intestate, the court refused so to do, and emphasized the refusal by adding, “I charge that the contract commenced on the death of the intestate.” Unless, under the circumstances of the case, the language employed by defendant’s intestate must of necessity be interpreted as importing an employment of the plaintiff, to take effect upon his decease, and as raising an implied promise on the part of the defendants to compensate him therefor, there was error at the trial, for which the judgment should be reversed. As already intimated, I am of opinion, not only that such is not their necessary import, but that no such construction can be given to them, without wresting them from their ordinary sense and significance, and according to them an elasticity of meaning of which they are by no means susceptible.

But assuming that the intestate’s directions as to the deposit of the box were intended to be executed after and not before his death, it may still be the case that under and by virtue of his original employment, the plaintiff was bound to obey them. He was employed at an annual salary, payable monthly. There is no presumption that the term of his employment would be precisely commensurate with the life of his employer. If not, he was entitled to receive compensation, at the rate agreed, during the entire period fixed



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for its continuance, irrespective of his employer's demise in the mean time. If entitled to compensation, after the death of his employer, by virtue of his original contract of employment, he was under the reciprocal obligation to perform, afterward, at the request or by the direction of his employer, the same services which he had previously been required to render. The burden was upon him to show the expiration of his original term of service, and a new contract by whose terms he was to be compensated in a different manner, or at a different rate.

It would seem hardly necessary, in view of the length to which this discussion has been already protracted, to assign additional reasons for setting aside this verdict, and directing a reversal of the judgment and order appealed from ; but my concurrence with the learned judge, who, when the case was formerly before the court, expressed the opinion that the verdict originally rendered was excessive, is so cordial and complete, that I cannot forbear to add a few words on that subject. During a period of eleven years next preceding the death of defendants' intestate, the defendant had almost daily performed services precisely the same as that for which he now seeks to recover, and at a regular fixed compensation of \$1,000 per annum, or less. When he received the directions for his obedience to which he now asserts his right to be paid, he was still engaged in the same service at the same rate, and was apparently satisfied to continue the relation indefinitely, on similar terms. No suggestion of dissatisfaction appears to have been made by him. He proposed no new stipulation as to a different mode or rate of remuneration. His omission so to do affords some evidence of his own estimate of the value of his services. And after all, what was the nature of the service to be rendered ? It required the exercise of no particular knowledge, skill, training or experience.

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It was one which any honest porter might well have executed, and which, within the observation of most people familiar with the conduct of business in financial circles, honest porters do very frequently perform. The court very properly charged that the responsibility of the undertaking was to be considered. He even suggested that the jury should put to themselves the question, how many men would be willing to take a million of dollars in valuable securities to their own house, and keep it one night, for any body, or for any sum. He ventured to say that not one of the gentlemen who had testified as to the reasonable and moderate compensation which such institutions as deposit companies, trust companies, express companies, &c., &c., usually charge for assuming the custody of the securities and funds of their customers, would themselves be persuaded to take a million dollars in such property, and take it to their homes and keep it for any body. And he added, that there would be not only the risk of answering for it in money, but that a man's whole reputation might be at stake if there was the slightest misfortune, even without fault, and the money was not forthcoming.

While it is doubtless proper, and even essential, that the responsibility attaching to services rendered should be considered in ascertaining and assessing their value, it is easy to exaggerate the degree of responsibility which such a service as that rendered by the plaintiff really involves. And while I am not disposed to impugn the charge of the learned judge as erroneous in this respect, I apprehend, and indeed am constrained to believe, that his observations may have tended, and probably did tend to impress the minds of the jury with an inordinate conception of the value of plaintiffs' services, not only after, but possibly even before the death of his employer; and it may be that a sense of the inadequacy of his previous compensation

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induced them to add somewhat to the amount which would fairly remunerate him for the particular service in question. That service required ordinary prudence and care, and common honesty, but it involved no such labor and no such responsibility as the law devolves on executors, administrators, and trustees, in the performance of their respective functions as the custodians of estates. And yet the claim of the plaintiff was for but little less than the law allows to such functionaries when the funds within their custody amount to a million of dollars; and the verdict of the jury fell but little short of the full amount of his claim. I do not think that the plaintiff's possession of the key of the box enlarged his responsibility. He had no authority to open it after the testator's decease, or to deal with it, if at all, otherwise than by immediately transferring it to the care and custody of the Safe Deposit Company, agreeably to the instructions he had received from his employer. Doubtless such transfer was a sacred trust, to be faithfully discharged; but when I "consider the plaintiff's relations with the deceased, and that a species of moral obligation devolved upon him to discharge this duty, irrespective of any question of compensation," I cannot but regard the verdict as excessive, and its approval as establishing a very questionable precedent. That its amount, approximately, should have received the sanction of two juries, ought not, in my judgment, to influence the action of the court, in favor of sustaining it where, as in the present case, the recovery may have been aggravated by the circumstance that the only limitation imposed upon the liberality of the jury by the judge who presided at the trial, consisted in a suggestion that their estimate of the plaintiff's services should not be such as would incur the risk of having the court exercise its judgment in setting aside their verdict as extravagant.

As this timely warning appears to me to have been

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utterly disregarded, I think the verdict should be set aside.

The motion to dismiss the complaint should have been granted. The verdict must be set aside, the judgment and order appealed from reversed, and a new trial granted, with costs to abide the event.

CURTIS, Ch. J., concurred in the above opinion.

FREEDMAN, J.—I agree to reverse, on the ground that the intestate's meaning in giving the instructions as to the disposition of the securities should have been distinctly submitted to the jury as a question of fact; and upon the further ground that in any aspect of the case the verdict is excessive.

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JAMES C. Y. CORNWALL, AS ADMINISTRATOR,  
&C., PLAINTIFF AND RESPONDENT, v. ROBERT  
J. MILLS AND JOHN W. AMBROSE, DEFEND-  
ANTS AND APPELLANTS.

STATUTE REQUIRING COMPENSATION FOR CAUSING  
DEATH BY WRONGFUL ACT, OR NEGLIGENCE OR DEFAULT.  
LAWS OF 1847, CHAP. 450. AMENDED 1870, CHAP. 78.

The statute does not limit the recovery to the actual pecuniary loss proved on the trial (*Ihl v. Forty-second St. and Grand St. Ferry R. R. Co.*, 47 N. Y. 817, and cases there cited).

The evidence of pecuniary injury to the husband in this case was quite sufficient to sustain the recovery.

Very slight evidence of pecuniary injury or loss is sufficient to warrant the submission of a case to a jury, who are thereupon to award "*such damages as they shall deem a fair and just compensation therefor.*"

If the jury is satisfied that pecuniary injury resulted from the

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death, they are at liberty (within the statutory limitation) to fix the compensation according to their sense of justice and right.

The direction in this statute to the effect, that the damages recovered in such an action shall draw interest from the time of the death of such deceased person, and shall be added to the verdict, and inserted in the entry of judgment, is not in conflict with the constitution.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided April 1, 1878.*

Appeal by defendants from a judgment for \$6,085.32, entered October 22, 1877, on a verdict in favor of the plaintiff; also from an order denying defendant's motion, made on the judge's minutes, for a new trial, on the ground that the damages are excessive, the verdict against the weight of evidence, the evidence insufficient to sustain the verdict, and on exceptions taken at the trial; also from an order granting an extra allowance of five per cent.; also from an order approving the insertion by the clerk, in the entry of judgment, of an item of \$646.53, for interest on the verdict of the jury, from the time of the death of the plaintiff's intestate.

The action was brought under the "Act requiring compensation for causing death by wrongful act, neglect, or default" (*Laws of 1847*, ch. 450, amended, 1870, ch. 78), to recover the damages sustained by the plaintiff, as administrator of his deceased wife, in consequence of her death, through the negligence and unskillfulness of the defendants in excavating the highway, at the intersection of Broadway with the Fifth avenue, at Twenty-third street, in the city of New York, for the purpose of laying gas-pipes therein.

It appeared on the trial, without contradiction, that on the morning of December 10, 1875, the plaintiff's

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intestate (his deceased wife), while crossing the Fifth avenue upon a diagonal cross-walk, extending from the northwesterly to the southeasterly corner of the Fifth avenue and Twenty-third street, fell into an excavation or pit which had been dug by the defendants in the roadway, under and on both sides of the cross-walk, for the purpose of laying gas mains beneath the surface. In thus falling she received injuries from which her death directly resulted. She died four or five days afterwards, at the Fifth Avenue Hotel, whither she was carried immediately after the fall.

The locality at which the accident occurred is one of the most crowded thoroughfares in the city, and is generally thronged by a continuous stream of vehicles and pedestrians. The excavation, as originally constructed, or intended so to be, was about two feet wide and from three to five feet deep, and extended for a considerable distance to the north and south of, as well as directly underneath the cross-walk. The excavation intersected the tracks of the Twenty-third street horse railroad as well as the cross-walk ; and at the point of such intersection the trench had caved in. The hole was larger there than elsewhere, its width at that point being six or seven feet. It was a dangerous hole. The cross-walk, before the excavation was made, consisted of three courses of stone, two of which had been removed by the defendants on the morning of the accident, leaving but one for pedestrians to walk over. This was about two feet in width. The earth taken from the excavation was heaped up on both sides of it. The cross-walk, however, or so much of it as the defendants had allowed to remain intact, was unobstructed. No railing or other barrier, for the exclusion or protection of people attempting to pass over the cross-walk, had been erected, and no precaution whatever had been adopted by the defendants for the purpose of preventing accidents. People had been crossing there all the

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morning, in great numbers, and among them many ladies.

The deceased left, surviving her, the plaintiff, her husband, and her father and several brothers and sisters, next of kin.

Exceptions were taken to the refusal of the court to dismiss the complaint, at the close of the plaintiff's case, and to portions of the judge's charge.

The court charged in effect, among other things, that there could be no recovery, unless it appeared from the evidence that the injured party was free from fault or negligence contributing to the injury; and that the law required on her part, the exercise of no more than ordinary care.

The case was submitted to the jury, with an intimation, that they would probably have no difficulty in finding that the defendants were guilty of negligence in leaving the trench exposed in the manner they did; but with the positive instruction that the plaintiff could not recover, if the deceased was negligent in any degree; but that he would be entitled to a verdict, if, on all the evidence, they decided that she was not guilty of negligence contributing to the injury.

Exception was taken to so much of the charge as stated that the law required that the deceased should exercise only ordinary care.

The jury rendered a verdict in favor of the plaintiff for \$5,000.

The court declined to set aside the verdict as excessive, or as against the weight of, or as unsupported by the evidence, and denied the defendant's motion, made on the minutes, for a new trial.

*George H. Starr*, for appellant.

*Ambrose Monell*, for respondent.

BY THE COURT.—SANFORD, J.—The rules of law

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applicable to cases of this description have been so well settled, by a long series of adjudications, that there scarcely seems room for misapprehension or discussion with respect them. To warrant a recovery, the injury or death complained of must have resulted solely from the wrongful act, neglect, or default of the defendant, and it must affirmatively appear that the person injured or killed was free from negligence contributing to the injury.

In the present case, it does not appear to be seriously contended that there was any error in submitting to the jury the question of defendant's negligence, even with the very decided intimation as to the opinion of the court upon that subject. It is, however, strenuously insisted, that not only did the plaintiff fail to exonerate his intestate from the charge of contributory negligence, but that the evidence adduced on his part so clearly established the fact that her own incaution or rashness occasioned the injuries which resulted in her death, that the court should have withdrawn the question altogether from the jury, and should have determined the case in favor of the defendants by dismissing the complaint.

While it is essential that the absence of negligence contributing to the injury should be made to appear affirmatively, on the part of the claimant, it is not always easy to establish that negative fact or conclusion by direct and positive testimony, and it is particularly difficult, and at times impossible, to do so, in cases where the injury has resulted in death. The mouth of the injured party is, in such case, closed, and resort must therefore, of necessity, be had to the next best evidence attainable, which often consists in the circumstances of the case, and in the presumptions and inferences, which may justly arise or be derived therefrom. The absence of contributory negligence may be made to appear from such circumstances, as well as



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from evidence directly establishing the fact, and it may be assumed, in weighing those circumstances, that all creatures are desirous of preserving their lives, and keeping their bodies from harm (*Morrison v. N. Y. C. R. R. Co.*, 63 *N. Y.* 643). The evidence showed that the deceased had enjoyed excellent health, previously to the accident, that she had no physical difficulty, that her eyesight was not defective, and that, in attempting to pass over the trench, upon the cross-walk which traversed it, she but followed the example of thousands of other people who preceded her. These facts tend to show that in her endeavor to effect the passage, she was guilty of no negligence. She did nothing but what other people, similarly situated, were accustomed to do. The law required of her ordinary care, and she had the right to presume, that, in the absence of any barrier or other intimation of insecurity, the cross-walk, ordinarily used, and then in actual use by multitudes, would afford her the means of safe transit, without a resort to any extraordinary precaution. The piles of dirt which lined the excavation on either side were quite as likely to screen as to indicate the impending peril, and the probability is that she found herself in a precarious and critical position before she had reason to anticipate its difficulties and dangers. The vigilance and caution to be exercised in avoiding disaster should not necessarily be commensurate with the danger that is imminent, but with the danger that is to be apprehended; and the necessity for the circumspection is qualified by the absence of those indications of peril which usually precede or attend the approaches of harm.

The observations contained in the opinion of the court in the case of *Thurber v. Harlem B. M. & F. R. R. Co.*, 60 *N. Y.* 326, in reference to the granting of non-suits in actions for negligence, are in my judgment peculiarly applicable to the present case, and

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should control its decision. "It is not enough," say the court, "to authorize a non-suit, that there is evidence which would have warranted the jury in finding that the plaintiff was negligent, and that his negligence contributed to the injury. The question of negligence depends very much upon circumstances, and is addressed to the judgment of men of ordinary prudence and discretion, and is ordinarily for the jury. When the inferences to be drawn from the proof are not certain and incontrovertible, it cannot be decided as a question of law by directing a verdict or non-suit, but must be submitted to the jury." In this case, I think it would have been error for the court to decide, as matter of law, that the attempt to cross the street, under the circumstances, was an act of negligence, and I am even of opinion that the evidence tends so decidedly the conclusion that there was no negligence on the part of the plaintiff's intestate, as to justify a direction to find for the plaintiff had such direction been given. The submission of the question to the jury, in view of the possibility that men of ordinary prudence and discretion might perhaps differ as to the character of the act, under the circumstances of the case, was a concession to the defendants, which should be the occasion rather of congratulation than complaint on their part. It does not lie with them to impute legal error to a judge who has accorded to them a larger liberality than that to which they were entitled. The motion for non-suit was properly denied. The case was submitted to the jury upon proper instructions as to the law, and the verdict is not only not against but is amply sustained by the weight of the evidence. It is no objection to the charge that the judge omitted to define for the instruction of the jury the term, "ordinary care." The rule as laid down in that regard was correct. If the defendants desired more precise instructions upon the point, or a technical

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definition, they should have preferred a specific request to that purport.

The evidence of "pecuniary injury resulting from such death to the husband and next of kin," was quite sufficient to sustain the recovery. The statute does not limit the recovery to the actual pecuniary loss proved on the trial (*Ihl v. Forty-Second St. and Grand St. Ferry R. R. Co.*, 47 *N. Y.* 317, and cases cited). Very slight evidence of pecuniary injury or loss is sufficient to warrant the submission of the case to the jury, who are thereupon to award "such damages as they shall deem a fair and just compensation therefor." If they are satisfied that pecuniary injuries resulted, they are at liberty, within the statutory limitation, to fix the compensation therefor according to their sense of justice and right.

The statute (*Laws of 1870*, ch. 78) expressly directs that "the damages recovered in any such action shall draw interest from the time of the death of such deceased person, and that such interest shall be added to the verdict and inserted in the entry of judgment." This provision is impugned as *ultra vires* on the part of the legislature, and contrary to organic law. We are not referred to any particular clause of the constitution which is supposed to be invaded by the enactment, and we perceive no reason why it should not be competent for the legislature to direct the allowance of interest on the damages awarded, as well from the date of the death of the deceased, as from that of the rendition of the verdict. The law has long allowed interest on verdicts to be computed by the clerk, added to the costs of the party entitled thereto, and inserted in the entry of judgment (*Code of Pro.* § 310). So far as we are aware, no objection on constitutional grounds has ever been urged against this provision of law, nor would any such objection, in our opinion, be tenable. The direction contained in the statute now under con-

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sideration is analogous, and is not obnoxious to criticism as in conflict with the constitution.

The extra allowance was authorized by law, and the discretion exercised by the learned judge who presided at the trial, in fixing its amount, cannot properly be questioned.

The judgment and orders appealed from should be affirmed, with costs.

CURTIS, Ch. J., concurred.

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THOMAS DONOVAN, AN INFANT, v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

ITS HISTORY, AND ITS POWERS AND DUTIES.

It is a governmental agency created by the sovereign power of the State, for the discharge of such powers and duties, as were conferred upon it by law, and in addition to its being or existence as such agency, it is also a corporation.

The statutes expressly provide that for the purposes for which it was created, the board should possess the powers and privileges of a corporation (*Laws of 1851*, chap. 886, § 2, subd. 1, § 8). They must, therefore, be subject to the obligations incident to the exercise of such powers (*Gildersleeve v. Board of Education, &c.*, 17 *Abb. Pr.* 201; *Ham v. Mayor, &c.*, 37 *N. Y. Super Ct. [J. & S.]* 458; *Dannat v. Mayor, &c.*, 6 *Hun*, 88).

*Held*, that under the pleadings in this case, the duty, for the neglect of which this action was brought, must be deemed to have been imposed upon the board in its corporate capacity, and it is liable for its neglect of such duty.

The case of *Clarrissey v. Metropolitan Fire Department*, 1 *Sweeney*, 224, held to be analogous to this case.

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Statement of the Case.

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Before SEDGWICK and FREEDMAN, JJ.

*Decided April 1, 1878*

The action is brought to recover damages for personal injuries sustained by the plaintiff on November 22, 1875, by falling into an unguarded opening extending from the yard of a public school building in Vandewater street, in the city of New York, into the cellar of said building, in consequence of the negligence of the defendant in allowing the covering thereof to be left open.

The answer is in effect a general denial of all the allegations of the complaint, with the exception of the following, which it expressly admits:

I. That the defendants are a corporation created by and existing under the laws of the State of New York.

II. That the plaintiff is an infant under the age of fourteen years, and is the son of William Donovan aforesaid.

III. That it is the duty of the defendant, as the board of education aforesaid, to have the safe keeping of all premises used for public ward schools in the city of New York, and to examine the safety of all school premises, and to see that the same are kept safe and in good order.

IV. That the defendant, at the time hereinafter mentioned, occupied a certain building and premises situate in Vandewater street, near Pearl street, in the fourth ward of the city of New York, and had the control and safe keeping of the same, with the appurtenances, which premises are known as grammar school No 1, and are used under the direction of the said board of education as one of the public schools of the city of New York, and was frequented by children attending said public school.

Upon the trial before the court and a jury, the com-

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plaint was dismissed, and plaintiff was not permitted to give evidence thereunder.

Plaintiff excepted to such ruling, and his exception was ordered to be heard at general term in the first existence.

*Thomas & Wilder*, attorneys, and *Edward P. Wilder*, of counsel, for plaintiff.

*William C. Whitney* and *D. J. Dean*, of counsel, for defendant.

BY THE COURT.—FREEDMAN, J.—The complaint having been dismissed at the trial before any proof was offered, the position of the parties is substantially the same as upon a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. For the purpose of determining whether it does or not, every allegation contained in it must be taken as true.

The complaint alleges that the defendant is a corporation, created by, and existing under the laws of the State of New York, and that, as such, it was not only its duty to see that the school premises in question were kept safe, and in good order, but also that it occupied and had the control and safe keeping of the same, with the appurtenances, &c., &c.

These allegations sufficiently aver, at least so far as the rules of pleading require it in cases of ordinary corporations, the legal capacity of the defendant to be sued, the duty imposed by law, and the occupation and use of the premises by the defendant. Moreover, they are expressly admitted by the answer, and hence the defendant was not, and is not now, in a position to insist that the duty averred rested upon, and the use and occupation in truth was by and in the trustees of the ward in which the premises are situate, and that

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if there was any negligence, it was by an employee of the trustees of the ward, for whose act or omission the defendant is not responsible.

A party who formally and explicitly admits, by his pleading, that which establishes the plaintiff's right, will not be suffered to deny its existence, or to prove any state of facts inconsistent with that admission (*Paige v. Willet*, 38 *N. Y.* 28 ; *Schreyer v. Mayor, &c. of N. Y.*, 39 *N. Y. Super. Ct.* [7 *J. & S.*] 1).

The defendant being thus concluded, and the complaint averring, in addition and with sufficient precision, an injury to the person of the plaintiff in consequence of the negligence of the defendant, the dismissal of the complaint can only be sustained provided, under the statutes relating to the board of education, no action whatever lies against it for negligence in the execution of its corporate duties.

Upon this branch of the case it has been argued :

I. That the board of education is an agency purely governmental, having no powers or franchises other than those which it is empowered and compelled to exercise for the public benefit, from which it derives no revenue or emolument as a corporation, and, therefore, is not liable for the consequence of neglect of an agent necessarily employed by it, in the absence of an express statute creating such liability.

II. That the duties defined by the statute creating the board fall within the class of purely governmental or public duties, and that, as to such duties, even when executed by a municipal corporation proper, endowed with all the powers usually vested in such a corporation, no liability arises for neglect of the agent employed in the execution thereof.

To determine the correctness of these propositions, it will be necessary to examine the statutes of this State relating to the defendant.

From the passage of the act passed April 9, 1805,

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entitled "An Act to incorporate the society instituted in the city of New York for the establishment of a free school for the education of poor children, who do not belong to and are not provided for by any religious society," and until the year 1842, the common school education in the city of New York was substantially in charge of the society thus incorporated, and whose name was altered in 1826 to "Public School Society of New York."

The General School Act of 1812 and the acts amendatory thereof, never applied to the city and county of New York during that period.

In 1842 the common school system, which had prevailed for thirty years in the residue of the State, was by statute extended to the city and county of New York (*Laws of 1842*, p. 184), and the management of the schools to be established under it was placed in the hands of inspectors, trustees and commissioners to be elected by the people. The act permitted the Public School Society and other corporations to continue their existing schools and to participate in the public funds according to the number of their scholars, but such participation was prohibited to any school in which any religious sectarian doctrine or tenet might be taught, inculcated or practiced. Under that act the first board of education was organized.

The new system, as matter of history, met with great opposition from the powerful, compact and disciplined private corporation that had so long enjoyed exclusive charge, but, being based on popular suffrage, it rapidly grew into popular favor and triumphed over all obstacles. In this contest between the two systems which radically differed in principle, the State further interfered by the passage of statutes forbidding the opening or establishing of any kind of new school in any way whatsoever without the consent of the board of education.



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Opinion of the Court, by FREEDMAN, J.

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In 1847, the board of education presented a memorial to the legislature, praying for authority to establish a free college or academy. The memorial stated that "one object of the proposed free institution is to create an additional interest in, and more completely popularize the common schools. It is believed that they will be regarded with additional favor, and attended with increased satisfaction, when the pupils and their parents feel that the children who have received their primary education in these schools can be admitted to all the benefits and advantages furnished by the best endowed college in the State, without any expense whatever." The legislature responded by the passage of a law, authorizing the establishment of the free academy, giving the board of education power to direct the course of studies therein, and providing that the question of establishing the same should be submitted to the vote of the people. It was so submitted, and carried by a large majority.

In 1851, an act was passed entitled "An Act to amend, consolidate, and reduce to one act, the various acts relative to the common schools of the city of New York" (*Laws of 1851*, c. 386). The act provides for the election of two commissioners in each of the wards of the city of New York, and that the commissioners so elected shall constitute a board of education. The second section, as amended by *Laws of 1854*, ch. 101, provides as follows :

"The board of education shall have power .

"1. To take and hold property, both real and personal, devised or transferred to it for the purpose of public education in the city of New York. . . .

"4. To establish new schools as hereinafter provided. . . .

"8. And for the purposes of this act, the said board shall possess the powers and privileges of a corporation."

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Opinion of the Court, by FREEDMAN, J.

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By section 25, as amended by *Laws of* 1853, c. 301, section 14, it is further provided :

“ The title to all school property, real and personal, purchased with any moneys derived from the distribution or apportionment of the school moneys, or raised by taxation in the city of New York, shall be vested in the mayor, aldermen, and commonalty of said city, but shall be under the care and control of the board of education, for the purpose of public education, and all suits in relation to the same shall be brought in the name of said board.”

In 1853 the contest between the system inaugurated by the State and the public school society terminated. The latter ceased to exist, and pursuant to chapter 301 of the laws of that year, all its corporate property was conveyed and transferred to the mayor, aldermen, and commonalty of the city of New York to be thereafter held by them in the same manner as the school property then used and occupied by the schools organized under the statutes of 1842 and 1851 was held by them.

By *Laws of* 1871, c. 574, § 7, amending the charter of the city of New York, that had been passed in 1870, the board of education was made a department of the government of the city of New York, and its title changed to “The Department of Public Instruction.”

But by *Laws of* 1873, c. 112, it was again reconstructed, and its original title and designation restored. Notwithstanding these changes, all the powers originally conferred were carefully preserved, so that the board of education, as now constituted, possesses the same powers and discharges the same duties which were vested in it prior to 1871.

Numerous other legislative enactments and amendments of the act of 1851 might be referred to, but they are omitted because, though they affected the terms of office of the commissioners, trustees and inspectors

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and their mode of selection, and the general organization of the school system of this city, they worked no change in the powers and duties of the board of education, as above stated. I shall only add, for the present, that upon its reconstruction in 1873, the board of education not only succeeded to all the powers and duties of the department of public instruction, but was expressly reinvested with the full control of the public schools and the public school system of the city, subject only to the general statutes of the State upon education.

From the foregoing examination it clearly appears that the board of education is a governmental agency created by the sovereign power of the State for the discharge of such powers and duties as were conferred upon it by law, and that in creating it the policy of the State was to instruct and enlighten equally the minds of all children needing education, irrespective of the nationality, religion or pecuniary condition of their parents, and by these means to gradually transform the heterogeneous and uncongenial elements of the cosmopolitan city of New York into an intelligent, virtuous, harmonious and happy people. But from these premises it does not necessarily follow that such agency cannot be sued for neglect of duty. The learned counsel for the defendant, it is true, has cited many cases in support of the theory that such liability does not exist, but most of them are cases in which it was held that political divisions of the State, municipal corporations, or boards of officers, exercising public duties only, are not liable, in the absence of a statute creating such liability, for the negligence of independent officers acting under them, whose duties are specifically prescribed by law, and who, though appointed and paid by them, are thus appointed and paid in pursuance of the requirements of a statute. The point decided in these cases is that, there being no control save

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in strict accordance with the provisions of law, the principle of *respondeat superior* does not apply. But in the leading case belonging to that class and arising in this State, it was conceded, and cases were adverted to to illustrate the concession, that where the duty is imposed upon the municipal corporation itself, and not upon public officers appointed by it, and where it accepts the duty and the power to perform it, and itself, by its own agents, sets about the work, or undertakes to set about it by its own agents, then, for negligent omission to do or for doing in a negligent way, it may be liable (*Maxmilian v. Mayor, &c.*, 62 *N. Y.* 160).

The case at bar is not shown to fall within the class of cases cited by defendant's counsel and above referred to, because the charge of negligence is made by the complaint against the defendant in its corporate capacity, and not against any particular officer or set of officers acting under its authority. Not even the word "agent" or "servant" is used. True, the defendant can act only through agents, but in the absence of proof of particulars, and especially in view of the admissions contained in the answer, it cannot be assumed that the negligence complained of was a negligent act or omission on the part of an independent officer, of whom the defendant is not the superior.

There is another class of cases which are equally inapplicable, in which it was held that certain persons spoken of as a concrete body could not be sued in their collective capacity, because they were not in law a corporation (*Gardner v. Board of Health*, 10 *N. Y.* 409; *Brady v. Supervisors*, *Id.* 260).

Nor would it answer any useful purpose to consider in what instances the commissioners constituting the board of education might perhaps incur an individual liability.

In addition to being a governmental agency, the board of education is also a corporation. This fact is

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alleged in the complaint ; the answer expressly admits it ; and the statutes relating to the defendant expressly provide that for the purposes for which it was created, the board should possess the powers and privileges of a corporation. For all such purposes it does possess all the powers and attributes of a corporation. This being so, the courts have held the defendant responsible for its own contracts, and refused to impose any liability therefor upon the mayor, aldermen and commonalty of the city of New York (*Dannat v. Mayor, &c. of N. Y.*, 6 *Hun*, 88).

For the same reason the courts have refused to inflict upon the municipality of New York the responsibility for defendant's torts or negligence (*Terry v. Mayor, &c.*, 8 *Bosw.* 508; *Ham v. Mayor, &c.*, 37 *N. Y. Super. Ct.* [5 *J. & S.*] 458, and affirmed by the court of appeals September 18, 1877). And finally, it has been established that this defendant may be directly sued, as a corporation, by a teacher employed pursuant to law by the board of trustees of a ward (*Gildersleeve v. Board of Education*, 17 *Abb. Pr.* 201, and cited with approval by the court of appeals in *Ham v. Mayor, &c.*).

In the opinion rendered in that case the general term of the court of common pleas held : "Though the power of appointing teachers is in the trustees, the payment of the salaries is imposed by law upon the board of education, and they are authorized to draw from the moneys which shall be raised for the purpose of public education such sums as may be requisite for the purpose (*Laws of 1851*, p. 735, ch. 386, § 2, subd. 5, § 3, subds. 1, 2, 5, 7, § 9). They may take and hold property, both real and personal, for the purpose of public education in the city of New York ; and for all the purposes for which they were created, it is declared that they shall possess the powers and privileges of a corporation (*Id.* § 2, subd. 1, § 8). If they possess the

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privileges and powers of a corporation, they must be subject to the obligation incident to the exercise of such powers."

Being thus subject to the obligation stated, it is difficult to perceive why the said board should not be liable to an action for the neglect of a duty imposed upon it by law. If the duty had not been imposed upon the board, but upon the commissioners or trustees of the ward in which the premises are situate, as such, the delinquent commissioners or trustees would be personally liable to the plaintiff (*Bassett v. Fish*, recently decided by the general term of the supreme court of the fourth department, see 5 *N. Y. Weekly Dig.* 360). As, however, the case stands at present under the pleadings, the duty for neglecting which the action was brought must be deemed to have been imposed upon the board in its corporate capacity, and hence the inquiry is narrowed down to the simple question whether the board as a corporation can be sued for its own neglect of duty imposed upon it by law.

To this it is objected :

1. That the rule holding a corporation liable for such neglect, applies only to a municipal corporation or any other corporate body enjoying franchises and privileges for its own convenience or benefit, and does not apply to those minor political organizations or *quasi* corporations, whose corporate powers and functions are conferred without their solicitation for the benefit, not of themselves, but of the public at large; and that the board of education belongs to the class secondly referred to; and,

2. That the amount of money for defraying the expenses of said board, which was formerly apportioned by the State to the county of New York, from the common school fund, is now wholly paid from funds raised by taxation, pursuant to an estimate submitted

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to and sanctioned by the board of apportionment, in the manner prescribed by *Laws of 1873*, chap. 335, section 112, as amended by *Laws of 1873*, chap. 757, section 20.

Similar objections were urged, and carefully considered by this court, in the highly analogous case of *Clarissey v. Metropolitan Fire Department* (1 *Sweeny*, 224). The act establishing that department created a fire district, composed of the cities of New York and Brooklyn. The governor and senate were authorized to appoint four commissioners to take and have control and management of all officers, men, property, measures, and action, for the prevention and extinguishment of fires within the said district, and to be known by the name of the "Metropolitan Fire Department." The department, as thus constituted, was not in terms declared to be a corporation, nor was it made subservient or responsible to any local authority in either city. Its officers and agents were appointed by a power above all local authority, and were held amenable only to the governor and the legislature. But the mode of raising money for its support was by estimates made by the commissioners and the comptroller and the mayor of the city of New York, as a board of estimate, which estimates, when approved by the board of supervisors of the county of New York, had to be levied and collected by said board of supervisors by taxation of the real and personal estate subject to taxation within the county of New York. All real estate, fire apparatus, hose, implements, tools, bells and bell towers, fire-telegraph, and all property of whatever nature, then or theretofore in use by the firemen or fire department of the city of New York, belonging to said city, was transferred to the keeping and custody of the Metropolitan Fire Department, and for its use, but the title to all such property remained in the mayor, aldermen, and commonalty of the city of New York. In regard



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to the title of property to be thereafter acquired, the act was silent.

Upon full discussion of all the facts and the provisions of law bearing upon the case, of which a more detailed mention than already given cannot be made here, and of the authorities cited, the court came to the conclusion that whether the Metropolitan Fire Department was regarded as a corporation *sub modo*, or as a collective body succeeding, under legislative authority, to the powers and capacities of the old fire department, which had been a corporation, it was, in either aspect, capable of being sued, and might be rendered liable in an action for injuries resulting from the negligence of its agents or servants, or from the faulty, defective or insufficient character of the apparatus used by it in extinguishing fires, and that the existence of difficulty in the collection of any judgment that might be recovered for any such cause, was not sufficient to defeat the action.

This decision stands unreversed ; nor have I been able to find any case since decided by the court of appeals in which it was questioned or overruled by implication or in effect. Being therefore the law of this court, the two objections lastly considered must be held untenable, especially as the board of education was expressly created a corporation for all the purposes of the act creating it, with power to take and hold property, both real and personal, devised or transferred to it for the purposes of public education in the city of New York.

For the foregoing reasons I am of the opinion that the complaint herein was erroneously dismissed, and that the exception taken by the plaintiff to such dismissal should be sustained and a new trial ordered with costs to plaintiff to abide the event.

SEDGWICK, J., concurred.



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Statement of the Case.

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PHOEBE ROBERTSON, PLAINTIFF AND RESPON-  
DENT, v. JAMES GORDON BENNETT, DEFEND-  
ANT AND APPELLANT.

**LIBEL.**

The term "blackmailing" is libelous *per se* (Edsall v. Brooks, 2 Robt. 34).

The law and practice of libel, especially in regard to publications in newspapers, discussed. Damages allowed plaintiff held not excessive, but judgment was reversed on the ground of erroneous admission of evidence.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 6, 1878.*

Appeal by the defendant from a judgment in the plaintiff's favor, entered upon a verdict for \$10,000, and also from the order denying a motion for a new trial.

The plaintiff alleged that the defendant, being the proprietor and publisher of a newspaper, known as the *New York Herald*, permitted and caused to be published therein, on November 19, 1876, an advertisement in these words: "The blackmailing crowd in West Twenty-fifth street had better beware, cautious 51 and 53."

The plaintiff claimed that she then resided in, and kept the two houses in West Twenty-fifth street, having the street numbers 51 and 53, as a boarding-house of good repute, and had so done for several years, and that this publication was particularly adapted and intended to be, and was injurious to her, in her business and credit and reputation, and that she was greatly damaged, injured, and annoyed by such publication, and demanded judgment for \$10,000 damages.

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The defendant denied that the publication was with his knowledge or consent, or that any person in his employ had any right or authority from him to make it, and he also denied the other allegations of the complaint.

The defendant also alleged that the plaintiff was not the real party in interest, and designated another person as such.

The defendant set up as a defense that the publication was true at the time thereof, in substance and in fact, and that there then was a blackmailing crowd at Nos. 51 and 53 West Twenty-fifth street, and also that by "blackmailing crowd" was meant and intended, not the plaintiff, but her daughter.

The defendant further alleged, as a defense, and as extenuating circumstances, that there was a quarrel between the plaintiff and her daughter and certain other parties, one of whom procured the publication to be made, which was contrary to the defendant's orders and without malice, and that before the commencement of the suit, he agreed to publish a retraction, to be in satisfaction of plaintiff's damage and claim, but that thereupon an attorney volunteered, at his own expense and risk, to commence this suit, and by threats and menaces compelled the plaintiff to consent thereto, and that after it was commenced the plaintiff wrote to the defendant, "All I desire is retraction," and that the plaintiff informed the defendant that she wished to withdraw this action, but that the attorney would not allow her to do so.

No retraction was published. During the examination of the first witness called at the trial, the defendant's counsel stated, "that there was not a word to be said against the respectability of the plaintiff or her house; the respectability of both were conceded."

At the trial, there were exceptions taken by the defendant to various rulings of the court, in regard to

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Opinion of the Court, by CURTIS, Ch. J.

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the admission and exclusion of evidence, also to the charge of the court and to various refusals to charge as requested.

On the rendering of the verdict, the defendant moved for a new trial on the minutes, on the ground that the damages were excessive, and that the verdict was contrary to the evidence. This motion was overruled and the defendant excepted.

*John Townshend*, for appellant.

*Wm. W. Badger*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The evidence shows that the plaintiff was a person of good character, and keeping a large and respectable boarding-house, which was a source of income and support for herself and her children, and that the publication complained of caused her injury, and damaged her business. Good character and respectability are elements of value in every worthy pursuit in life, and probably in few more so, than in the business conducted by the plaintiff. The law seeks to protect persons from being wrongfully deprived of them, and subjected to loss and injury.

The case shows, that the defendant's newspaper was made the instrument of inflicting pain and injury, by this publication, which, without the personal knowledge or consent of the defendant was printed by the oversight of his servants.

It would be natural for almost any one, who had been thus made the instrument of injuring the character and business of a person situated as the plaintiff was, and so dependent upon good character and respectability, to hasten to restore to the person thus injured, as far as possible, her good name and reputation, and to do all that could be done, by publishing an explana-

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Opinion of the Court, by CURTIS, Ch. J.

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tion of the circumstance, and a retraction of the statement.

In the present instance, for reasons, if any, not appearing in the proofs, no retraction was published, and the answer states substantially that the publication complained of, was, at the time thereof, "true in substance and in fact;" a defense not sustained by the evidence at the trial.

It was sufficiently shown at the trial, that the defendant was the publisher and proprietor of the journal, and the law holds him responsible for whatever appears in its columns, although he neither authorized nor knew of the publication (*Huff v. Bennett*, 4 *Sandf.* 120).

The complaint alleges that the publication "was a libel of the plaintiff," and that in her business as a boarding-house keeper she was damaged, and also in her credit and reputation. If the defendant was prejudiced by the averment being too general, he should have applied for an order that the plaintiff make her complaint more definite and certain (*Van Wyck v. Guthrie*, 4 *Duer*, 274).

As the publication did not designate the plaintiff or her business by name, she properly proved such extrinsic facts as showed that persons reading it and knowing her would apply it to her (*Miller v. Maxwell*, 16 *Wend.* 9). It was proper for the jury to determine from the evidence, whether the words were published of the plaintiff, and in what sense, if ambiguous, they were so published (*Sanderson v. Caldwell*, 45 *N. Y.* 398).

It was urged on the argument that there was nothing in the term "blackmailing" which is libelous, and that it has nothing in its primary and proper meaning which is libelous. It was however, conceded, that sometimes it is used in a different sense, and that in that sense it may be actionable. The words published should be construed in the sense in which they are understood by those who read them (*Backus v. Richard-*

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Opinion of the Court, by CURTIS, Ch. J.

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son, 5 *Johns.* 483). It is inconsistent with a due regard for the protection of the public from libelous attacks, that obsolete or antiquated and practically unused meanings of words should be searched for and studied out, to show that at some remote period of history they were not opprobrious, in order to shield a party publishing and using them in respect to another in that now only used and universally established sense, that holds him up to public reproach, and indignation. Mr. Hamilton's definition of a libel, in his argument in *People v. Croswell* (3 *Johns. Cas.* 354), is referred to with approval in *Steele v. Southwick* (9 *Johns.* 215), and in following it, the courts of this State have avoided the embarrassments from varying definitions that have elsewhere arisen. In *Weed v. Foster* (11 *Barb.* 203), the principle upon which it rests was presented in this language by HARRIS, J.: "Is such a charge calculated to injure the character of the plaintiff, or to degrade him in public estimation? If it is, then the court is required to say, as matter of law, that the charge is libelous. No extrinsic fact need be stated to give point or meaning to the charge. The language of the alleged libel is to be understood in the ordinary and most natural sense." The conclusion reached in *Edsall v. Brooks* (2 *Robt.* 34), "that the term 'blackmailing' is universally regarded as an unlawful act," and is libelous *per se*, is one to be concurred in.

The testimony made it apparent that these words complained of were understood and applied by persons knowing the plaintiff and reading them, as imputing to the plaintiff disgraceful and degrading conduct. In their ordinary and most natural sense they indicate that the plaintiff's house was the abode and harbor of a blackmailing crowd, and the proprietress and its inmates are held up to public scorn and avoidance.

It is claimed that the damages, \$10,000, are exces-

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sive. In this case, the plaintiff was presented to the public, under a charge personally degrading and seriously injuring her business. The advertisement was the offspring of malice. The defendant, by its publication, inflicted a great injury upon a comparatively helpless and entirely innocent person. No apology and no retraction were published by the defendant, but on the contrary a justification was pleaded, which was unsustained by proof. The welfare of society requires that the infliction of purely wanton and cruel wrongs of this class, without an effort to repair or retract them, should not be passed lightly over. The circumstances of this case are such, that if properly before the jury their discretion in determining the amount of the damages should not be inconsiderately interfered with, on the ground of excessiveness.

A grave question arises, as to whether there was not testimony received at the trial, which should have been excluded. A witness,—Meredith L. Jones, Esq., counselor-at-law,—testified to the effect that shortly after January 1, 1877, he was recommended to the plaintiff's boarding-house, and made an examination of the rooms and prices, and expected, if he had gone, to pay \$28 per week for second floor back, of No. 51, and when asked why he did not go to the house, he answered: "Well, my wife called my attention to a publication, something about a blackmailing crowd at 51 and 53 West Twenty-fifth street." He also testified that it led him to hesitate about going there, and that he did not go there. Upon his cross-examination, he testified that he did not remember what newspaper it was; that he thought it was in the legal column, the reports of the courts.

The publication complained of was in the "personal" column of the *Herald* of November 19, 1876.

The defendant moved to strike out the testimony of this witness, on the ground that it did not appear

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to relate to the libel complained of. This motion was denied, the court stating "it has no effect as binding you, but simply giving what he heard," and the defendant excepted.

There was no evidence connecting the defendant with this publication, made after January 1, 1877, which in fact was the report of a legal proceeding between these parties, and published in another newspaper, the *Times* of January 16, 1877. The testimony of this witness, when it appeared that he did not remember in what newspaper he saw the words that led him to hesitate about going to board at the plaintiff's house, or not to go there, should have been stricken out pursuant to the defendant's motion. The defendant can only be called on to respond for his own publication, and the damages caused by it. If another newspaper published the report of a legal proceeding in this cause, that prejudiced the plaintiff, this defendant is not liable for that. If such publication was unlawful, the plaintiff is entitled to redress from that publisher; if lawful, she is without remedy. As soon as it was apparent that the injury which the witness testified the plaintiff herself sustained in her business, from his attention being called to a publication respecting her boarding-house was not occasioned by the publication complained of in this suit, but by another, the motion to strike out his testimony should have been granted.

If it appeared that this testimony did not prejudice the defendant, and that the jury were uninfluenced, by its remaining before them, subject to what was stated by the court at the time of the denial of the motion to strike it out, the defendant's objection to it would be answered. But it is difficult to take this view of it. The testimony of this witness remained before them. There is nothing that indicates that they were to exclude it wholly from their consideration. Is it prob-

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Statement of the Case.

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able they drew the distinction, in determining the plaintiff's damages, between such as were caused by the publication in the defendant's paper and such as were caused by publications in other journals, and which, as reports of legal proceedings, were lawful? Can it be determined that the legal rights of the defendant were not prejudiced, and the jury influenced to some extent adversely to him by this evidence? These questions cannot easily be answered in the negative. It is better to adhere to the rules of evidence, by which all parties are protected, than to sustain a departure from them, on grounds that are not clearly tenable.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to abide the event.

SANFORD, J.—I concur on the ground that the evidence of Meredith L. Jones was inadmissible, and should have been stricken out.

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SARAH SLAUSON, PLAINTIFF AND RESPONDENT,  
v. HEZEKIAH WATKINS, IMPLEADED, &C.,  
DEFENDANT AND APPELLANT.

SPECIFIC PERFORMANCE,—MARRIED WOMAN.

In this case the plaintiff, a married woman, owned certain real estate subject to a purchase money mortgage for \$22,000, executed by her. She entered into a contract with defendant to sell and convey the said real estate, and defendant covenanted and agreed to pay this mortgage as a part of the purchase money. Plaintiff executed the contract on her part by conveying the property to a third person, as requested by defendant, subject to the lien of the mortgage, but without any covenant of the grantee to pay said mortgage.



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The mortgage not being paid according to its terms, the mortgagee commences an action to foreclose the same, making plaintiff a party defendant, to answer for any deficiency on the sale.

The plaintiff commences this action against defendant for the specific performance of his contract to pay said mortgage. *Held*, that said contract cannot be enforced specifically until it is established, with definiteness and certainty:

1st. That there will be a deficiency on the sale of said real estate.

2nd. The amount of that deficiency.

*Held*, also, by Judge SANFORD, that plaintiff cannot enforce this contract, because she has no interest in the matter, for as a married woman she executed the bond and mortgage, and under *Cashman v. Henry* (see page 193, *post*), she incurred no personal liability thereby, and did not charge in equity her separate estate other than the mortgaged premises, and, having conveyed away all interest in the mortgaged premises, she has no interest entitled to protection from the defendant.\*

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 6, 1878.*

Appeal by the defendant Hezekiah Watkins from a judgment directing that the agreement set forth in the complaint be specifically performed and awarding other relief to the plaintiff.

On the first day of October, 1872, the co-defendant, B. L. Ludington, sold and conveyed to the plaintiff a house and lot on Lexington avenue, for \$30,000. The plaintiff, Mrs. Slauson, on the same day, executed and delivered to him (Ludington) a purchase money mortgage for \$22,000 ; \$5,000 payable October 1, 1873, and \$17,000 October 1, 1877, together with her bond for the same amount, and payable in like manner. A few months afterwards, and about April 17, 1873, the plaintiff, by her husband, Charles S. Slauson, made a verbal agreement with the defendant Watkins, to sell to him said house and lot with the furniture, for

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\* *Cashman v. Henry* has been reversed by the court of appeals. See *post*, p. 100.

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\$35,000. On April 18, 1873, the plaintiff delivered to Elizabeth F. Watkins a full covenant warranty deed of said house and lot. The deed from the plaintiff to Mrs. Watkins, was drawn by a Mr. Shear, who was then in the law office of the defendant, Watkins, and, by the direction of the latter, the name of Elizabeth F. Watkins, the wife of the defendant, Hezekiah Watkins, was inserted in the deed as the grantee of the premises.

The premises were conveyed to Mrs. Watkins, subject to the mortgage of \$22,000, but there was no covenant in the deed to pay the same.

On the same day that the deed was executed and delivered by the plaintiff to Mrs. Watkins the defendant, Hezekiah Watkins, executed and delivered to the plaintiff a written agreement setting forth that he had purchased the house and lot and furniture, for the sum of \$35,500, payable \$22,000 thereof by his assumption of the payment of the mortgage of \$22,000 given by the plaintiff to B. L. Ludington.

The defendant, Watkins, took possession of the house on May 3 or 5, 1873, and has been in possession ever since.

The installment upon the mortgage which became due October 1, 1873, not having been paid, Mr. Ludington commenced an action in the superior court to foreclose the mortgage, and thereupon Ludington and Watkins entered into an agreement, by which Watkins agreed to pay \$2,000 thereon, and the payment of the balance of the installment (\$3,000) was extended to April 1, 1876.

On May 16, 1876, the \$3,000 last mentioned not having been paid, and the defendant, Watkins, having made default in the payment of the interest which became due April 1, 1876, Mr. Ludington commenced an action in the supreme court to foreclose the mortgage, making the plaintiff a defendant, and demanding judgment against her for any deficiency.

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Opinion of the Court, by CURTIS, Ch. J.

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On July 7, 1876, the plaintiff commenced this action for a specific performance of the agreement made by Watkins, by which he assumed the payment of the mortgage.

Ludington was made a party defendant, and the prayer of the complaint was that the defendant, Watkins, might be adjudged to pay the mortgage to his co-defendant, and that thereupon Ludington might be adjudged to surrender up the bond and mortgage to be canceled.

The court, after finding substantially the foregoing facts, found, as matter of law, that the defendant Watkins should pay to his co-defendant the sum of \$4,341.80, being the balance of the installment then due on the mortgage, with the interest on \$20,000 to that date.

The court further decreed that if the defendant Watkins should elect to pay the balance then unpaid, but not yet due, upon the mortgage (to wit: \$17,000), then the defendant Ludington should assign the bond and mortgage to him, and that he might, at his election, proceed to foreclose the mortgage in the action then pending in the supreme court. Judgment was entered accordingly.

*Oliver W. West*, for appellant.

*George W. Lord*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The agreement of the defendant, Hezekiah Watkins, was to pay \$22,000, being a part of the consideration for the sale of a house and furniture, bought by him from the plaintiff, “by the assumption of a certain mortgage now on said premises to B. L. Ludington, together with interest from April 1, 1873.” The plaintiff fulfilled the agreement on her part, conveying the prop-

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Opinion of the Court, by CURTIS, Ch. J.

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erty subject to this mortgage to the defendant's wife instead of to him, but at his request. There was no covenant on the part of the grantee in the deed to assume the payment of this mortgage. This omission did not impair the obligation entered into by the defendant, her husband, to assume, that is, to take upon himself, such payment. He could fulfill this obligation, as far as the plaintiff was concerned, by permitting the property thus conveyed at his request, or its proceeds, if sold under foreclosure, to be applied to its discharge, and if they were insufficient, by paying the deficiency to the holder of the mortgage; or he could pay in cash the principal and interest of the sum secured by the mortgage as it became due.

A part of the mortgage, \$5,000, became due October 1, 1873, and the balance, \$17,000, became due October 1, 1877, subsequent to the commencement of this suit. The defendant Watkins paid \$2,000 of the \$5,000 when it became due, and obtained from the defendant, B. L. Ludington, the mortgagee, an extension of the time of payment of the remaining \$3,000, until April 1, 1876. Upon the failure of the defendant Watkins to pay this \$3,000, Ludington commenced an action in the supreme court to foreclose the mortgage. Subsequently to this, and about July 7, 1876, the plaintiff commenced the present suit. There is no claim made by the plaintiff, nor does it appear, from the proofs, that she is aggrieved, or sustains loss, by any delay, on the part of Ludington, to enforce the payment of the mortgage in question.

The procurement of the extension of the payment of \$3,000, by the defendant Watkins, from Ludington, does not operate to discharge the defendant Watkins from his liability under the agreement entered into by him with the plaintiff. The protection afforded to her by this agreement cannot be defeated by an act to which she is a stranger.

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Opinion of the Court, by CURTIS, Ch. J.

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The difficulty with the plaintiff's case is this. There is nothing that establishes conclusively that there will be any deficiency resulting from a foreclosure and sale of the mortgaged premises. If the proceeds of such a sale are sufficient to pay the remaining unpaid part of the mortgage debt, the defendant Watkins' obligation to the plaintiff in that behalf ceases. A foreclosure suit was in progress when the present suit was instituted. There is no delay in such suit shown that prejudiced the plaintiff. If in this foreclosure suit, there is a deficiency, then her remedy and the extent of it are clearly defined.

The judgment appealed from is based upon the finding, "that there will be on the foreclosure sale a deficiency of several thousand dollars for which the plaintiff will be liable." The remedy sought by the plaintiff in this action is, in effect, an attempt to obtain protection from her personal liability for such a probable deficiency. The evidence fails to establish with definiteness or certainty that there will be a deficiency, still less what will be its amount. It is apparent, that it depends upon contingencies affecting the prices of property, that cannot be determined in advance. In the very nature of things, these prices are ever fluctuating, in accordance with the laws of demand and supply, and when in addition, the legal tender qualities of various mediums of payments are subject to unforeseen changes by legislation, it is obvious that neither witnesses nor courts can with reasonable certainty divine what prices property will bring at future foreclosure sales, and also that justice cannot be administered upon the basis of such foresight.

This leads to the conclusion, that from what appears in the case, the plaintiff should have waited until her own liability, if any, was established by the result of the pending foreclosure suit, before resorting to her remedy.

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Concurring opinion of SANFORD, J.

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The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event of the suit.

SANFORD, J.—I concur with the chief justice in the opinion that the enforcement of a right of action in favor of the plaintiff, and against the defendant Watkins, if any such there be, must be postponed until it shall have been definitely ascertained whether or not the proceeds of a sale under decree of foreclosure will suffice to satisfy the mortgage. But I am unable to perceive any ground, legal or equitable, upon which the plaintiff can insist upon the enforcement of a claim against Watkins, under any circumstances. She has no interest in the matter. If entitled to relief, at all, it must be by way of indemnity or protection against her own personal liability as obligor or mortgagor. Having conveyed the mortgaged premises, and being no longer interested therein, it is only as obligor that she can be charged. But it appears from the evidence and from the findings of fact, that when she executed the bond and mortgage, she was under the disabilities of coverture, being then the wife of her co-plaintiff, Charles S. Slauson, deceased since the commencement of the action. We hold in *Cashman v. Henry* (decided concurrently with this case), that a married woman incurs no personal liability, and does not charge, in equity, her separate estate, other than the mortgaged premises, by assuming payment of a mortgage subject to which lands are conveyed to her, although the amount of such mortgage be allowed to her, as part of the purchase money, expressed to be paid as the consideration of such conveyance. The same principle is equally applicable to a bond and mortgage executed by a married woman for or on account of the purchase money of lands conveyed to her. In both cases, the common law disability of coverture renders her inca-

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pable of contracting or of incurring liability, except in so far as she is expressly authorized by statute. Her bond is void. She charges her separate estate to the extent expressed in the mortgage, but neither the bond nor the mortgage creates any lien upon her separate estate, otherwise than as therein expressed, and neither bond nor mortgage subjects her to personal liability, as if she were a feme sole. The remedies of her vendor and mortgagee are therefore restricted, as against her, to the particular premises mortgaged, and to the enforcement of his lien thereon.

Under this view of the case, the plaintiff is under no personal liability for, and has no interest in the payment of the mortgage. She requires neither indemnity nor protection; and her interference on behalf of the mortgagee is wholly gratuitous.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

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ROSE McDONALD, ADMINISTRATRIX, &C., PLAINTIFF AND APPELLANT, v. CHARLES H. MALLORY, ET AL., DEFENDANTS AND RESPONDENTS.

POLITICAL JURISDICTION OF A STATE.

EXTENT OF, RIGHT AND EXERCISE OF.—STATUTE GIVING ADMINISTRATOR, &C., ACTION FOR DEATH CAUSED BY NEGLIGENCE.

A State has a right of jurisdiction, through its law, over a vessel belonging to it, that is on the high seas (*Crapo v. Kelly*, 16 *Wall.* 610, and authorities there cited; and also *Thuhler v. Trans. Co.*, 35 *N. Y.* 352). But where the exercise of the right of jurisdiction is committed by the State to its legislators or officials, that exercise is limited, 1st, by the powers given to them by the State, 2nd, by their intent as expressed or mani-

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Statement of the Case.

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festated by statute or action; that is, in the present case, whether or not the statute extends to vessels on the high seas, depends upon the intent of the legislature in that respect in enacting the statute. *Held*, in this case, that the intent of the legislature was that this statute,—*i. e.*, allowing action for benefit of next of kin, &c., for death caused by negligence,—should operate only within the territorial boundaries of the State, and the cause of action having arisen beyond the same, the action cannot be maintained.

Before CURTIS, Ch. J., and SEDGWICK, J.

*Decided May 6, 1878.*

Appeal from order sustaining demurrer to complaint.

The complaint averred that at the times referred to, the defendants were residents and citizens of the State of New York, and owners of the steamer Waco, which belonged to and was registered in the port of New York, that the defendants loaded her, among other things, with 300 cases of crude petroleum, in violation of section 4,472 of the Revised Statutes of the United States; that when she sailed from the port of New York, and down to the time of his death, the deceased was a fireman belonging to her; that when she was on the high seas in the Gulf of Mexico, a fire started on the steamer which would not have endangered the life of the deceased, if it had not reached and ignited the petroleum; but the fire did ignite the petroleum and thereupon it was unextinguishable, and caused the death of all on the steamer, and among them, the deceased. The complaint in various charged the death to have been caused by the negligence of the defendants.

The action was brought under the statute of 1847, as amended, found in 4 *Edm.* pp. 526, 527, and 7 *Edm.* p. 591.



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Appellant's points.

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The defendants demurred that no cause of action was stated.

The demurrer was sustained.

*Benedict, Taft & Benedict*, attorneys, and *E. M. Taft*, of counsel, for appellents, urged :—I. The statute upon which this action is based and the amendments thereto will be found in *Edm. Ed. of Gen. Stat.* vol. 4, pages 526 and 527, and vol. 7, p. 591.

II. The death of Charles McDonald, under the circumstances stated in the complaint, was caused by such wrongful act, neglect or default on the part of the defendant as would, if death had not ensued, have entitled him to maintain an action and recover damages in respect thereof. (*a*) The receiving the petroleum mentioned in the complaint, on board the defendants' steamer, and carrying the same, were acts sufficient in themselves to constitute such wrongful act, neglect, or default (*Rev. Stat. of the U. S.* § 4,472; *Jetter v. New York and Harlem R. R. Co.*, 2 *Abb. Ct. App. Dec.* 458; *Beisigel v. N. Y. Central R. R. Co.*, 14 *Abb. Pr. N. S.* 29; *Blanchard v. New Jersey R. R. Co.*, 59 *N. Y.* 296; *Massoth v. Delaware and Hudson Canal Co.*, 64 *Id.* 531–535; *Quinn v. Moore*, 15 *Id.* 32). (*b*) But in addition to the specific acts mentioned, there are ample allegations of negligence on the part of the defendants, which, upon the hearing of this demurrer, must be taken as true, sufficient to maintain an action by the party injured, had he survived the injury.

III. The next question then is, does the statute extend to this case so as to give a right of action to the administratrix?—and this we suppose to be the substantial question in the case. (*a*) It will be contended by defendants' counsel, that this case cannot be distinguished from the many cases which, with entire uniformity, hold that this statute has no extra-territorial

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Respondents' points.

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force ; but they are all cases in which there could have been no recovery, without giving the statute an operation beyond any possible jurisdiction of this State (Whitford v. Panama R. R. Co., 23 *N. Y.* 465 ; Crowley v. Same, 30 *Barb.* 99 ; Beach v. Bay Steamboat Co., 30 *Id.* 433 ; Vanderventer v. N. Y. & New Haven R. R. Co., 27 *Id.* 244 ; Whitford v. Panama R. R. Co., 3 *Bosw.* 67 ; Mahler v. Norwich & N. Y. Trans. Co., 45 *Barb.* 226 ; S. C., 35 *N. Y.* 352). (b) That there may be no mistake as to our understanding of the operation of the statute in question, we quote here a statement of the rule by which we are willing to stand or fall, contained in the case of Whitford v. Panama R. R. Co. (23 *N. Y.* 471), as follows : “ *Prima facie*, all laws are co-extensive, and only co-extensive with the political jurisdiction of the law-making power.” Our contention is that the case at bar, as stated in the complaint, occurred within the political jurisdiction of the State of New York, and is therefore covered by the law in question ; and this upon two grounds : *First*. That the complaint states such a wrongful act committed at the city and port of New York, and within the strict and exclusive territorial boundaries of the State as will support this action. *Second*. The political jurisdiction of the State of New York, so far as the subject-matter of the statute in question is concerned, extended to the steamer Waco, not only while it was in the port of New York, but after it left that port, and until its burning and the death of McDonald upon the high seas, as alleged in the complaint (Crapo v. Kelly, 16 *Wall.* 610 ; Steamboat Co. v. Chase, 16 *Wall.* 522 ; Sherlock v. Allen, 93 *U. S.* [3 *Otto*] 99).

*Butler, Stillman & Hubbard*, attorneys, and *William Allen Butler*, of counsel, for respondents, urged : —I. This statute gives a remedy unknown to the common law, and its operation is limited to the sover-

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Respondents' points.

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eighty and dominion of this State, and can only apply when the cause of action arose within the State. It does not give a right of action in this State to recover for injuries committed without the State and resulting in death (*Whitford v. Panama R. R. Co.*, 23 *N. Y.* 465 ; *S. C.*, 3 *Bosw.* 67 ; *Crowley v. Panama R. R. Co.*, 30 *Barb.* 99 ; *Beach v. Bay State S. Co.*, *Id.* 433 ; *Vandeventer v. N. Y. and New Haven R. R. Co.*, 27 *Id.* 244 ; *S. C.*, 6 *Abb. Pr.* 239).

II. It was conceded on the argument of the demurrer at special term, by the plaintiff's counsel, that the statute could have no extra-territorial force, but it was insisted that the steamer being owned by citizens of New York, and belonging to the port of New York, it was, although on the high seas at the time of the disaster which caused the death of the plaintiff's intestate, constructively within or a part of the territory of New York, so as to be under the operation of the statute. In support of this proposition, the case of *Crapo v. Kelly*, 16 *Wall.* 610, was cited and relied upon. This case was carefully considered by the court at special term, and the learned justice who sustained the demurrer rightly held that it had no application to this action, and did not contravene the rule as laid down by the court of appeals in *Mahler v. Nor. & W. Trans. Co.*, 35 *N. Y.* 352. In the opinion of Mr. Justice HUNT (*Crapo v. Kelly*), the ground was taken that for the purposes of the suit, which related only to the validity of the title of the assignee in the Massachusetts insolvent proceedings as against an attaching creditor in New York, the vessel, although on the high seas, was a portion of the territory of Massachusetts so far as to pass the title, in the same manner as if she had been within the territory of Massachusetts. But this point was not necessary to the decision, and even if Judge HUNT's view is correct, it was expressly limited to the case under discussion, and it goes only to the

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Respondents' points.

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extent that for the purpose of giving validity to a title to property on the high seas, a transfer under the law of a State made within the State, equally with a transfer made by private deed, would be upheld, and the judge expressly excepts the case of marine torts as well as marine crimes (see p. 623, at foot) where he says in reference to such exceptions, that in respect to jurisdiction as regards them "no rule of property is thereby established." The case is thus confined to the question of title to property, and in no wise asserts extra-territorial force to a statute which relates not to property rights, but to the operation of a quasi-penal statute which, under all the authorities, can have no extra-territorial force. "It is a conceded principle that the laws of a State have no force, *proprio vigore*, beyond its territorial limits" (Hoyt v. Thompson, 5 N. Y. 320, 340).

III. It appears on the face of the complaint that the steamer was at the time of the disaster on the high seas, near the harbor of Galveston, Texas, and therefore out of the territory of the State of New York, and it also appears that the sole cause of action is for a tort there committed. The law having been settled by the court of appeals that the right to enforce such a cause of action depends upon the question whether the alleged tort was committed in a locality actually within the territory of this State, it is impossible for the plaintiff, on the facts alleged in the complaint, to maintain this action in this court, and the order for judgment for the defendant on the demurrer should therefore be affirmed.

IV. The averments in the complaint respecting the shipment of 300 cases of petroleum in New York, contrary to the provisions of section 4,472, U. S. Revised Statutes, do not aid the plaintiff's case. The sole alleged ground of imputing blame to defendants, as respects the petroleum, is, that it was a contraband

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Opinion of the Court, by SEDGWICK, J.

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article of freight. But its contraband quality did not set it on fire, and its shipment did not naturally or legitimately lead to its conflagration ; so that the connection between the shipment and the death of plaintiff's intestate is not direct, but remote, and according to well-settled rules of law it cannot be made the ground of any claim in this statutory action, or relieve the case of the fatal defect of want of jurisdiction (See *Bradley v. Mutual Ben. Life Ins. Co.*, 45 *N. Y.* 422 ; *Butler v. Kent*, 19 *Johns.* 228 ; *Hoey v. Felton*, 11 *C. B. [N. S.]* 142 ; *Cox v. Burbridge*, 13 *Id.* 430 ; *Clarke v. Brown*, 18 *Wend.* 213, 229 ; *Addison on Torts*, 3rd Ed. 5).

BY THE COURT.—SEDGWICK, J.—The demurrer was sustained on the ground that the statute had no operation on a vessel on the high seas.

The case of *Crapo v. Kelly* (16 *Wall.* 610), and the authorities cited by Judge HUNT, show that a State or nation has a right of jurisdiction through its law, written and unwritten, over a vessel belonging to it, that is on the high seas. This was held to be true of a vessel of a State of the Union. It was deemed that such State had the right of jurisdiction that she held before she became part of the Union. This proposition is sustained by *Mahler v. Transportation Co.* (35 *N. Y.* 352).

These positions are not founded upon the fiction of the territory being extended to the vessel. But the fiction is an illustration of, and is founded upon the necessary principles in relation to the power and prevalence of municipal law. A vessel, or the people upon it, would be without law or law-less, unless the obligations of the law of the place from which they had come followed and controlled. Therefore, both the laws of the State and the nation have dominion on a vessel on the high seas.

But this right of jurisdiction may never be exer-

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cised. However imperative may be the duty of the State to exercise it, or however much it may be for the interest, yet the fact may be that it never meant to exercise it. In case the only evidence as to this exercise of jurisdiction is the existence of the right of sovereignty, without any self-imposed limitations upon it, created by the State, there can be no doubt that there has been an exercise of the jurisdiction. The unwritten law, therefore, controls, in full power, wherever the right of jurisdiction extends.

But where the exercise of jurisdiction is committed by the State, that is, the people of the State, to legislators, or to men in other official relations, that exercise is limited by the intent of the legislators or officers in acting within the powers given by the people. That is, in the present case, whether or not the statute extends to vessels on the high seas, depends upon the intent of the legislature in passing the statute.

On first impression, it might seem that the intent must be, that the law was meant to operate in all places where the sovereignty of the State extended, and that, as to a general law, it is not necessary to suppose that the legislature had in conscious view the particular places where the law was to operate, and where it was not to operate.

This, however, is to be modified in the present instance. The State, through its officers or legislature, had never claimed that the sovereignty of the law of the State included its ships on the high seas. No legislative or executive or judicial act had recognized the right to jurisdiction.

At the last revision of the statutes, the first section begins (p. 120, vol. 1, Banks 6 Ed.): "It being deemed useful for the information of the citizens and officers of this State, that its boundaries, so far as its jurisdiction is now asserted, should be declared, it is therefore declared that the State of New York is bounded as

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follows," &c., and the first section of the next title (p. 127, *Id.*), is : "The sovereignty and jurisdiction of this State extends to all the places within the boundaries thereof as declared in the preceding title," &c.

And the highest evidence that this State never intended to extend its law to its vessels on the high seas, is contained in the opinion of the court of appeals in *Kelly v. Crapo* (45 *N. Y.* 86). For of course that court would not have denied to Massachusetts the kind of jurisdiction it recognized as existing for this State.

Although the reversal of this case stated a rule which leads to a recognition of the right of jurisdiction of our State, it did not, of course, touch the fact of our State having exercised it.

As the legislature, when passing this statute under consideration, did it in view of the State having, as a fact, abstained from the exercise of the jurisdiction, and the State never having recognized the right of jurisdiction, it must be that the intent was that the law should operate only within the territorial boundaries of the State. The particular circumstances take it out of the general rule that the sphere of the operation of statute is co-extensive with the sovereignty of the State.

I therefore think that the statute does not support this action, and further, that the cause of action did not arise within the territory of New York. The nature of the cause of action, as a marine test, does not make the prosecution of this common law remedy inconsistent with the admiralty and maritime jurisdiction of the United States (*Dougan v. Champlain Transportation Company*, 56 *N. Y.* 4).

Order affirmed, with costs.

CURTIS, Ch. J., concurred.

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Statement of the Case.

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CORNELIUS SCULLY, PLAINTIFF AND RESPOND-  
ENT, v. JOSHUA C. SANDERS, DEFENDANT  
AND APPELLANT.

## CONVEYANCING.

A general clause of description in a deed is sufficient.

The following description, held good:—"Also all other lands contained within the limits of said commons, as described on said map, &c., not heretofore conveyed by the parties of the first part, &c."

*Semble*, the above does not apply to sale by sheriff and other officers. *Jackson v. Delancey* (11 *Johns.* 373, *aff'd* 13 *Id.* 551), distinguished from the case at bar.

Before CURTIS, Ch. J., and SEDGWICK, J.

*Decided May 6, 1878.*

Appeal from judgment entered on verdict of jury.

The complaint alleged that the defendant wrongfully entered into and upon certain lots, land of the plaintiff, and took certain lumber.

The answer was a general denial.

On the trial the plaintiff read a stipulation that the fee simple of lands known as Harlem Commons, including the lots in question, were on May 1, 1832, vested in Dudley Selden. Harlem Commons were laid out on a map on file in the Register's office, and the lots in question were 59 and 60 thereon.

The plaintiff offered in evidence a deed by Dudley Selden to Isaac Adriance. It recited: "Whereas the said Dudley Selden has heretofore received sundry conveyances of certain lands, known as the Harlem Commons, in the Twelfth ward of the city of New York, and has from time to time bargained, sold, conveyed and mortgaged parts thereof, and whereas, the



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title to certain other parts of said premises still remains unconveyed, a description whereof is hereinafter set forth, as appears by the lot book, as the same has been examined by the parties of the first and second parts," and it conveyed "All the following lots, pieces or parcels of land, situate, lying, and being in the Twelfth ward, and known and distinguished as part of the Harlem Commons, and which said lots hereby conveyed are laid down on a map, said commons made by Charles Clinton, of the city of New York, surveyor, as lots, numbered and bounded as follows, lots number 1, &c., &c." Also all other lands contained within the limits of said commons, as described on said map of said Charles Clinton, not heretofore conveyed by the parties of the first part, &c.

The defendant objected to the admission of the deed, on the ground that it does not embrace the premises in question. The objection was overruled and exception was taken.

The will of Isaac Adriance, the above grantee, devising all his real estate to his wife Margaret E. Adriance, was offered in evidence. The defendant objected on the same ground, and excepted to the ruling of the court admitting it.

The deed of Margaret E. Adriance to John Townshend, having a specific description of the land in question, was admitted in evidence, the defendant objecting on the ground that the grantor had no title.

A lease from Townshend to plaintiff was offered in evidence and received, with exception by defendant, on the ground that Townshend had no title.

Testimony was given as to the trespass and damages. At the end of plaintiff's case, defendant's counsel moved to dismiss the complaint on the ground "that no title to the lots in question was conveyed by the deeds and instruments put in evidence, and the plaintiff has no title to the premises, and on the ground

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Opinion of the Court, by SEDGWICK, J.

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that the plaintiff had no actual possession of the premises, at the time of the commencement of the action." The motion was denied, and exception taken.

The defendant proved that before the plaintiff entered into actual possession of the premises, the defendant had taken possession of the lots, which were then vacant, and had enclosed them with a substantial fence, under a conveyance in fee of the premises to him by Gordon Burnham. It was not shown that Burnham had any title or had ever been in possession. There was no deed on record conveying the premises to Burnham.

The court charged that the plaintiff was entitled to a verdict, and directed the damages to be assessed. The defendant's counsel excepted to the charge that the plaintiff was entitled to a verdict.

The jury found for plaintiff, and judgment was entered, from which defendant appeals.

*Townsend & Mahan*, for appellant.

*John Townshend*, for respondent.

BY THE COURT.—SEDGWICK, J.—It appeared that before the trespass complained of, the defendant had been in actual possession of the lots. That then the plaintiff entered under his landlord, Mr. Townshend, and built a small house. This was afterwards torn down, but the plaintiff was in actual possession when the defendant entered and did the damage complained of. If Townshend was the owner in fee, at the time the plaintiff was in possession, the latter had an action of trespass against defendant. And in case the defendant had no title, when in possession, he was only a trespasser as to Townshend, if the latter had title. The latter might lawfully enter, so far as the matter of title and possession between the parties was concerned.

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Any subsequent entry of defendant was a trespass as to Townshend and the plaintiff, his lessee.

These being the rights and obligations of the parties, the plaintiff proceeded to prove Townshend's title.

The only question that I can perceive, that the defendant raised or called to the court's attention, had regard to the intrinsic character of the conveyance by Selden to Adriance, and the only point actually raised was that such conveyance could transfer no title, because of the uncertainty of the description of the premises, there being no "word of description, whereby a single inch of land, within the 290 acres composing the Harlem Commons can be located." The argument was "It is, therefore, so far as conveying any portion of said commons, inoperative and void."

The objection does not seem valid. A general clause of description is sufficient. An ancient and most common form was all my land or messuages, &c., in such a town or county. The appellant cites *Jackson v. Delancey*, 13 *Johns.* 551, as sustaining his position. That case referred to the certainty of description necessary in proceedings to sell taken by sheriffs, but the chancellor takes the distinction and says: "Perhaps the case may be different, if the description in the mortgage be general, and the mortgagee sells under a power and the mortgagor will not come forward at the sale and point out and identify the lands. The sale in such a case depends upon the contract of the parties, &c." The case affirmed the judgment of the supreme court (11 *Johns.* 373), and the opinion of the supreme court had said more specifically: "The general description in this mortgage is liable to no objection. A party conusant of his right may sell a mortgage, by general description, though an officer must define what he sells. The general description was: 'And also other the lands, tenements and hereditaments whereof

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the said William &c., was seized, &c., within the county of Ulster." The present description is very much like it. All the land within the commons, which the party has not conveyed, is tantamount to all the land there of which he is seized.

On the trial or the argument the defendant did not raise any question as to whether, in order to show title under the deed of Selden to Adriance, it was necessary for the plaintiff to give some proof that Selden, at time of his deed, had not conveyed or remained seized of that part of the commons which is now described as lots numbers 59 and 60. That specific question has not been presented, and it is not necessary to find if it has any importance. It was not presented below, and probably, as I judge from a part of the printed brief, because it was taken for granted that the record would have disclosed no conveyance, and that that was sufficient for the purpose as against the defendant, as he did not prove any title from Selden.

The judgment and order denying motion for new trial should be affirmed with costs.

CURTIS, Ch. J., concurred.

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**MICHAEL H. CASHMAN, EXECUTOR, &C., PLAINTIFF AND APPELLANT, v. JOHN F. HENRY, ET AL., DEFENDANTS AND RESPONDENTS.**

**MARRIED WOMAN—HER LIABILITY AND DISABILITY.**

**MORTGAGE, COVENANT OF GRANTEE TO PAY.**

Where a grantor of an equity of redemption in mortgaged premises is not personally liable to pay the mortgage debt, and has no legal or equitable interest in such payment, except so far as

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the mortgage may be a charge upon the lands mortgaged, his grantee thereof incurs no liability to the holder of the mortgage by reason of a covenant on his part, contained in the deed, to assume and pay the mortgage (King v. Whitely, 10 Paige, 465; Vrooman v. Turner, 69 N. Y. 280).

Under the statutes as they now exist, a married woman, as incident to her right to acquire real and personal property by purchase, and hold it to her sole and separate use, may purchase property upon credit and bind herself by an executory contract to pay the consideration money, and her contract may be enforced against her in the same manner and to the same extent as if she were a feme sole, and her liability in such case does not depend upon the proof or existence of special circumstances, but is governed by the ordinary rules which determine the liability of persons *sui juris* upon their contracts. (This last point or head-note is based upon the decision of the court of appeals in this case on December 10, 1878, reversing the conclusion of this court at general term, in regard to the personal liability of the parties defendant for any deficiency, &c. The opinion of the court of appeals follows that of the superior court.)

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 6, 1878.*

Appeal from so much of a judgment in foreclosure as declares that three defendants, the appellants Henry, Curran, and Bowen, are not personally liable for any deficiency in the proceeds of sale to pay the amount reported due to the plaintiff.

The facts of the case, as found by the learned judge before whom the trial was had, at special term, without a jury, are, briefly, and so far as material, as follows :

On October 1, 1872, Samuel Simon, Jr., made and delivered to the plaintiff his bond for \$40,000, conditioned in the payment of \$20,000, on October 1, 1875, with interest. At the same time, and as collateral thereto, he executed and delivered to the plaintiff a

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mortgage, bearing even date therewith, whereby he granted and conveyed to the plaintiff certain land and premises in the city of New York, upon the same condition as that expressed in the bond. Such bond and mortgage were given to secure payment of part of the purchase money of said premises, on the simultaneous conveyance thereof, by the plaintiff, to the said Simon. By deed, dated June 20, 1873, Simon conveyed the mortgaged premises to Kate M. Cormac, wife of Francis Cormac, for the expressed consideration of \$31,000, subject to the said mortgage. The deed contained a claim referring thereto, in the following terms, viz.: "Subject nevertheless to a certain mortgage now on said premises, amounting, in the aggregate, to the sum of \$20,000 with interest thereon, which the said party of the second part hereby assumes and agrees to pay, the same forming part of the consideration money hereinbefore expressed." The said Kate M. Cormac accepted such conveyance, and, by deed, dated May 1, 1874, for the expressed consideration of \$30,000, conveyed the mortgaged premises to the defendants Henry, Curran, and Bowen, subject to the said mortgage. The deed contained a clause, in all respects similar to that above set forth as contained in the deed of Simon to Kate M. Cormac, and the said defendants accepted such conveyance, and were the owners of the premises when the action was commenced. At the dates of the said conveyances to and by her, respectively, Kate M. Cormac was the wife of Francis Cormac, who joined with her in the execution of the deed to said defendants.

There was due to the plaintiff, upon such bond and mortgage, at the commencement of the action, \$20,000, with interest from April 1, 1877.

No evidence was offered tending to show that Kate M. Cormac was ever engaged in any trade, occupation

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or business, or ever had any separate estate, legal or equitable, except as above stated.

As conclusions of law, the judge held that the plaintiff was entitled to judgment for the foreclosure of the mortgage and sale of the mortgaged premises; but that the defendants Henry, Curran and Bowen were not, nor was either of them, personally liable for the payment of any deficiency upon the sale of the said premises pursuant to such judgment; and that they were entitled to recover from the plaintiff their costs.

Exception was duly taken to the ruling of the court in holding that the said defendants were not personally liable.

Judgment was thereupon rendered for the foreclosure and sale of the mortgaged premises; and in and by such judgment the said defendants were expressly exonerated from personal liability.

No personal judgment was demanded in the complaint against Kate M. Cormac. The appellants answered, admitting the validity of the mortgage, but controverting their personal liability thereon by virtue of the assumption clause in their deed.

The plaintiff appeals from so much of the judgment as declares that the respondents are not personally liable.

*Jacob F. Miller*, for appellant.

*George C. Holt*, for respondent.

BY THE COURT.—SANFORD, J.—Where the grantor of an equity of redemption in mortgaged premises is not personally liable to the holder of the mortgage for the payment thereof, and has no interest in such payment, legal or equitable, except in so far as the mortgage may be a charge upon the mortgaged lands, his grantee thereof incurs no personal liability to the holder of the mortgage, by reason of a clause con-

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Opinion of the Court, by SANFORD, J.

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tained in the deed, whereby the payment of such mortgage, is, in terms, assumed and agreed to be paid by him as part of the consideration of such conveyance (King v. Whatly, 10 *Paige*, 465 ; Vrooman v. Turner, decided by the court of appeals, April 10, 1877, but not yet reported, vide 4 *N. Y. Weekly Dig.* 504 ; *N. Y. Daily Register*, June 2, 1877). The case last cited carefully and clearly distinguishes the principle upon which exemption from liability is accorded to the grantee of mortgaged premises, under the circumstances above stated, from the rule adopted in that class of cases of which *Lawrence v. Fox* (20 *N. Y.* 268) is an example, and in which it has been held that an action sometimes accrues in favor of one, for whose benefit a promise has been made to another, against the promisor, upon the breach of such promise. It holds that, in order to give the third party, who may derive benefit from the performance of the promise, a right of action against the promisor, there must be in him a legal right to adopt and claim the promise as made for his benefit, founded upon some obligation or duty on the part of the promisee toward himself.

Where no such obligation or duty exists, as, for instance, when a grantor of mortgaged premises is not personally bound for the payment of the mortgage debt, the rule adopted in that class of cases cannot be invoked. The principle upon which a grantee, who assumes payment of a mortgaged debt for which his grantor is personally liable, may be directly pursued by the mortgage creditor, or held for any deficiency in the proceeds of a sale of the mortgaged premises, is involved in, and grows out of the equitable doctrine of subrogation, whereby a creditor is entitled to the benefit of any security held by a surety for the payment of the debt due him. As between the grantor, liable for the payment of a mortgage, and his grantee, who assumes and agrees with him to pay it, the latter



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becomes, in equity, the principal debtor, the former a surety for the payment of the debt. The creditor, under the rule of subrogation, may resort to the rights and remedies available to the surety, who is charged with an obligation or duty towards himself, and may enforce them in the same manner, and to the same extent, as the surety himself may do. But, if the grantor be not chargeable with any liability to the holder of the mortgage, no relation of suretyship exists as between him and his grantee, and the rule of subrogation is, therefore, wholly inapplicable to any promise or undertaking made by the grantee in his favor.

It would seem to follow from these premises, that unless Kate M. Cormac was personally liable to the plaintiff for the payment of the bond and mortgage in suit, or for a deficiency upon the sale of the mortgaged premises, no right of action accrued to him, or exists in his favor as against her grantees, the present defendants. In other words, unless the plaintiff's claim can be enforced against her, neither can it be enforced against those to whom she may have recourse by way of indemnity, in case of its enforcement against herself. He can only be entitled to subrogation to her rights and remedies, by reason of her obligation or liability to himself.

We have, therefore, to inquire and determine, whether, under and by virtue of the assumption clause contained in the deed to herself, Kate M. Cormac, the defendant's grantor, became personally liable to the plaintiff for the payment of his mortgage, or so charged her separate estate with liability for its payment, as to be legally or equitably interested in having it paid, after she ceased to have any interest in the lands upon which it was a specific lien. If she was under no obligation to the plaintiff in respect to it, and had no interest in securing its payment, except to the extent it charged those lands, the plaintiff acquired no

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right, and can enforce no remedy against the defendants, under and by virtue of their covenant of assumption contained in the deed from her. It affirmatively appears that she was a married woman at the date of the conveyance to herself. Her coverture precluded her from contracting, and her disability rendered her contracts void, except in so far as the provisions of the married women's acts imparted validity to them. The *onus* of establishing the validity of a contract made by a *feme covert* is upon him who asserts it. It was earnestly insisted, upon the argument, that the burden of proof was upon the defendants, to show that their grantor was not liable. Such is not the correct view to take of the relations subsisting between the parties. The plaintiff claims that the defendants are liable to him. To establish such liability, he must show that the defendants' grantor, with whom they contracted, as he alleges for his benefit, was under some obligation to him, from which it can be inferred that the contract with her was intended to have that effect. The plaintiff was therefore under the necessity of proving against them, the same state of facts which would have been requisite, if he had sought to establish the liability of their grantor against herself. To establish her liability, it would have been essential that he should prove, not only a contract, but a contract within the statutory exceptions. As no intention to charge her separate estate was expressed in the instrument or contract by which her liability is supposed to have been created, it should have been made to appear by proof, on the part of the plaintiff, either that such liability was assumed in the prosecution of a trade or business carried on by the wife, or that it had relation to, and was incurred for the benefit of the wife's separate estate (*Manhattan B. & M. Co. v. Thompson*, 58 *N. Y.* 80). No evidence was adduced tending to establish either of these conditions. As was said in *Nash v.*

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Mitchell (MS. opinion of court of appeals, reversing 8 *Hun*, 471, vide *Alb. L. J.* December 15, 1877), "The law does not authorize the presumption, and courts cannot assume without evidence, that a simple contract without anything on its face to indicate the fact, was made for the benefit of the estate of a married woman." The same case is full authority for the proposition, that the burthen of proof is upon him who asserts, and not upon him who impugns the validity of a contract made by one under the disabilities of coverture. The proofs would not, in my opinion, have warranted a finding that Mrs. Cormac ever became personally liable to the plaintiff for the payment of his mortgage, or ever charged the payment thereof upon her separate estate.

The costs of the issue tendered by the answer were in the discretion of the court below. I am of the opinion that such discretion was wisely and properly exercised.

"The judgment, so far as appealed from, must be affirmed, with costs against the appellants.

CURTIS, Ch. J., concurred.\*

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\* The reporters, deeming it advisable that the opinion of the court of appeals reversing the judgment in above case should be at once published, have obtained the kind consent of Mr. Sickles, reporter of the said court, thereto.

ANDREWS, J.—This court, in *Vrooman v. Turner* (69 *N. Y.* 280), affirmed the doctrine of *King v. Whitely* (10 *Paige*, 465), that where a grantor of an equity of redemption in mortgaged premises is not personally liable to pay the mortgage debt, and has no legal or equitable interest in such payment, except so far as the mortgage may be a charge upon the lands mortgaged, his grantees thereof incurs no liability to the holder of the mortgage by reason of a covenant on his part, contained in the deed, to assume and pay the mortgage. The grounds of this doctrine are fully stated in the opinion in the cases cited, and need not be here adverted to. The defendants claim the benefit of the rule, and they were by the judgment of the court below exonerated from liability for the deficiency arising on the fore-

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Opinion of the Court of Appeals, by ANDREWS, J.

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closure sale in this action on the ground that Mrs. Cormac, their grantor, was not personally bound or liable to pay the plaintiff's mortgage. The mortgage was executed by one Simon to the plaintiff, in 1872, to secure the payment of his bond for \$20,000. In 1873, Simon, the owner of the equity of redemption in the mortgaged premises, conveyed them by deed to Kate M. Cormac, a married woman, for the consideration, as expressed in the deed, of \$31,000, subject to the mortgage, which the grantee, by the terms of the deed, assumed and agreed to pay as a part of the consideration of the conveyance.

In 1874, Mrs. Cormac, together with her husband, deeded the premises to the defendants, subject to the mortgage, which they, in turn, assumed and agreed to pay. It was not shown upon the trial that Mrs. Cormac when she purchased the lands had any separate estate, or that she was engaged in any trade or business on her own account or otherwise. The purchase comprised four city lots, but it does not appear for what purpose they were brought, whether for use or resale. The finding of the court that Mrs. Cormac was not personally liable to pay the plaintiff's mortgage notwithstanding her express agreement contained in the conveyance from Simon was put upon the ground that a married woman has no general capacity, under the acts of 1848, 1849, 1860 and 1862, to bind herself by a contract to pay the purchase price of land bought by and conveyed to her, and that her common law disability attaches to and makes her contract void, unless it appears that the purchase was made and the liability incurred in the prosecution of a trade or business carried on by her on her separate account, and that to charge her estate in equity for the debt, there must have been an antecedent separate estate capable of being charged, and the intention to charge it expressed in the contract, or the consideration must be one going to the direct benefit of such estate.

The question presented is one of considerable importance, and not free from difficulty. The case of *Yale v. Dederer* (18 N. Y. 265; 22 *Id.* 450), arose under the acts of 1848 and 1849, and it was determined in that case that the statutes then under consideration did not remove the common law disability of a married woman to contract debts or bind herself by a personal obligation, and that her engagements in any case could only be enforced by way of equitable charge upon her separate estate, and that such charge could only be created by an intention declared in the contract which is the foundation of the charge, or when the contract was for the direct benefit of her estate, and it was held that her estate was not charged by the execution of a promissory note which she had signed in the ordinary form of such a

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contract as surety for her husband. The construction put upon the acts of 1848 and 1849 in *Yale v. Dederer* has been followed in other cases, and the decision in that case is controlling as to the construction of these statutes, and in respect to cases coming within the same principle.

It is difficult to hold, in view of the decision in *Yale v. Dederer*, that under the acts of 1848 and 1849 the contract of a married woman to pay for land purchased by her is valid, either in law or equity, or enforceable against her estate, when she receives no other benefit from the transaction than the benefit implied from the acquisition of the title to the land purchased, at least when the land purchased constitutes her entire estate. This view of the statutes does not, however, involve the injustice of allowing a married woman to obtain the title to land upon a promise to pay the purchase price, and then to hold it free from any claim or lien for the purchase money. Upon the well settled doctrine of equity, if her bond or other security for the payment of the consideration is void, the land would be subjected, upon principles quite independent of any doctrine appertaining to the separate estates of married women, to a lien in favor of the vendor for the unpaid purchase money. The act of 1848, as amended in 1849, so far as it authorized a married woman to take by gift or grant from any person other than her husband, real or personal property, was not an enabling statute. This capacity she had at common law (*Derby v. Callaghan*, 16 *N. Y.* 71; *Knapp v. Smith*, 27 *Id.* 278). The new capacity given to a married woman by that act was to hold the estate or property acquired by her in any of the modes designated therein as her separate property without the creation of a trust, or the intervention of trustees, free from the control or power of disposition of the husband, with the right to convey and devise it as if she were a *feme sole*.

In *Huyler v. Atwood* (26 *N. J. Eq.* 504; S. C., 28 *Id.* 275), a case almost identical in its facts with this, the same question arose as to the liability of the grantees of a married woman, who in the conveyance to them had assumed the payment of a mortgage on the land, which she had likewise assumed in the conveyance from her grantor, to pay a deficiency arising on the foreclosure of the mortgage.

Section 8 of the New Jersey statute of 1852, relating to married women, is in nearly the same words as the same section of our statute of 1848, and the court affirmed the liability of the defendants for the deficiency, upon the ground that the covenant of their grantor to assume and pay the mortgage in the conveyances to her was valid, notwithstanding her coverture, and the conclusion as to the validity of her covenant was reached upon the ground that the legislature, by

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Opinion of the Court of Appeals, by ANDREWS, J.

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giving to married women the capacity to acquire real estate by grant, impliedly authorized them to enter into a contract of purchase, and to bind themselves to pay the purchase money. The limited construction put upon our statute in *Yale v. Dederer*, would not probably justify us in adopting, in its full extent, the view of the New Jersey court, but this court, in *Ballin v. Dillaye* (37 *N. Y.* 35), which arose under the acts of 1848 and 1849 and 1860, went very far towards holding a married woman liable on her bond, given on her purchase of land, for the payment of the purchase money. In that case, the question was whether the defendant, Mrs. Dillaye, a married woman, was liable on her bond for a deficiency upon a foreclosure of a mortgage executed by her to the plaintiffs. She obtained title to the premises by purchase at a foreclosure sale of a mortgage, held by a bank. The plaintiffs, at the time, held a junior mortgage on the same premises, and intended upon the sale to bid to the extent of their mortgage. Mrs. Dillaye wished to prevent their bidding. A written agreement was accordingly executed between her and the plaintiffs, by which, in substance, the plaintiffs agreed to advance \$7,000 to clear the title, and not to bid at the sale, and she agreed to recognize their mortgage as valid, and to give them, on her purchasing the premises, her bond and mortgage on part of the premises, to secure the payment of their mortgage debt, and the \$7,000 advanced.

Pursuant to the agreement the plaintiffs advanced the money and refrained from bidding, and the defendant bought the premises and executed to them a bond and mortgage covering the advance and the amount of their original mortgage.

On the trial of the question of Mrs. Dillaye's liability for the deficiency, the plaintiffs offered to prove that at the time of the transaction she had a separate estate. There was no offer to prove, nor did it appear, that Mrs. Dillaye had any interest in the mortgaged premises prior to her purchase on the foreclosure of the bank mortgage, or that her antecedent separate estate was pledged for the mortgage debt or had any relation to the mortgaged premises.

The special term rejected the proof offered, and held that the defendant was not liable for the deficiency, and the decision of the special term was affirmed by the general term. This court reversed the judgment and directed a new trial.

It is a little difficult to ascertain the precise grounds upon which the decision in this court proceeds. The court, in reference to the fact that Mrs. Dillaye had a separate estate, say that it was relevant and material, and in view of the offer on the trial to prove the fact, it is assumed in the consideration of the case. But I do not understand that her liability is put upon the ground that she had a separate

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estate at the time of the purchase—certainly it was not put upon this ground alone. It is not perceived how Mrs. Dillaye's liability at law or in equity for the deficiency could be affected by the fact that she had a separate estate at the time of the transaction, unless it was connected by contract or otherwise with the property purchased. But the court seem to hold that as she by the purchase on the foreclosure of the bank mortgage acquired not only the property included in the plaintiff's mortgage, but other lots in addition, the obligation entered into by her was for the benefit of her estate, and that her whole estate was therefore chargeable with the deficiency.

It is claimed on the part of the plaintiff that the case of *Ballin v. Dillaye* decides in his favor the question now presented. But without considering whether the circumstances under which the bond in that case was given distinguish it in principle from this, I am of opinion that the covenant of the defendant's grantor to assume and pay the Simon mortgage, was binding and valid on the ground that under the acts of 1860 and 1862, in connection with the previous, a married woman may purchase property on credit and bind herself by a contract to pay the purchase money, and that it is not a material circumstance in respect to her liability, whether she had any antecedent separate estate, or whether the contract on her part was a prudent, wise and advantageous one.

The act of 1860 greatly enlarged the civil capacity of a *feme covert* beyond what was conferred by the previous legislation. By section 2 she is empowered to bargain, sell, assign and transfer her separate property, and carry on any trade or business and perform any labor or services on her sole and separate account. Section 3 authorizes a married woman possessed of real estate as her separate property, to bargain, sell and convey the same, or to enter into any contract in reference thereto, with the assent in writing of her husband, or by authority of the court, obtained as provided in the section. Section 7 provides that she may sue and be sued in all matters having relation to her separate property, or in relation to property which might thereafter come to her by descent, devise, bequest or gift of any person, except her husband, in the same manner as if she were sole. Section 8 declares that the husband shall not be bound by any bargain or contract of the wife "in respect to her sole or separate property, or any property which may hereafter come to her by descent, devise, bequest, or the gift of any person except her husband," or by any bargain or contract entered into by her in or about the carrying on of any trade or business under any statute of the State or render him or his property in any way liable therefor.

The authority given to a married woman by this statute to carry



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on any trade or business on her own account, and to have and control her own earnings, whether living with her husband or living separate from him, worked a radical change in the pre-existing law, and it has been held by this court in several cases that as incident to her authority under this statute to carry on a trade or business a married woman may enter into any contract in respect thereto. She may purchase real or personal property on credit for the purposes of the trade or business into which she is about to enter, and bind herself by contract of payment, and also by her contracts made in the course of the business in which she engages (*Bodine v. Kelleen*, 53 *N. Y.* 93; *Frecking v. Pollard*, *Id.* 423). In the case last cited it was said, "The power to carry on a separate trade or business includes the power to borrow money and to purchase upon credit implements, fixtures and real or personal estate necessary or convenient for the purpose of commencing it, as well as the power to contract debts in its prosecution after it has been established."

The limitation upon the power of a married woman to deal with her real estate contained in section 8 of the act of 1860,—which made the assent of her husband, or the order of the court, necessary to the validity of her conveyance of her lands, or her contracts in respect thereto,—was removed by the amendment of 1862, and a clause was added to the section, expressly authorizing her to enter into any of the usual covenants for title, in her contracts in relation to, or her conveyances of, her real property, which covenants the section declares shall be obligatory to bind her separate property.

It will be observed that these statutes confer upon a married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified; she may sell or give it away. She may enter into any contract in respect to her separate real property "with the same effect and in all respects as if she were unmarried," and this court has held that as incident to her separate ownership, she is liable for torts committed in its management and for the fraud of her agent in dealing with third persons in respect to it (*Rowe v. Smith*, 45 *N. Y.* 130; *Baum v. Mullen*, 47 *Id.* 577). She may engage in business and incur the most dangerous and even ruinous liabilities in its prosecution, and they will be enforced against her to the same extent as if she were unmarried. She is no longer regarded as under the tutelage of the court, but the new legislation assumes that she is capable of managing her own interests.

But it is insisted that she may not bind herself by a contract for the purpose of land, if she has no antecedent estate to be benefited, or if the purchase is not made for the purposes of a trade or business.



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The policy of such special limitation, in view of the general scope of our statutes and the conceded power of married women to charge and dispose of their property, and incur liabilities in its management, is not apparent.

In *Stewart v. Jenkins* (6 *Allen*, 300), the supreme court of Massachusetts, under a statute of that State which provides, "that a married woman may bargain, sell, and convey her separate real and personal property, enter into any contract in reference to the same, carry on any trade and business, and perform any labor and services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, &c., as if she were sole," held that a married woman was bound by a note given as the consideration in part of a conveyance of real estate, on the ground that it was a contract in reference to her separate estate within the statute, and the court rejected, as too narrow, the construction insisted upon by the defendant, that the power given to a married woman by the statute to enter into a contract in reference to her separate estate was limited to the estate owned by her when the contract was made.

The section of the Massachusetts statute considered in *Stewart v. Jenkins* is very nearly like the third section of our statute of 1860, as amended in 1862. But the intention of the legislature to confer upon a married woman the general capacity to enter into a valid executory contract to pay for property purchased by her is indicated by sections 7 and 8 of the act of 1860, as amended in 1862. Section 7 of the act of 1860 was amended by the act of 1862, by inserting the word "purchase" in the first clause of the section, so that it should read: "Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may come to her by descent, devise, bequest, purchase, &c." And section 8 was amended by inserting the same word in that section so as to embrace in the exemption of the husband, exemption from liability on the contracts of the wife made in respect to property coming to her by purchase.

These amendments indicate that the legislature had in view the acquisition by a married woman of the title to property by purchase and the clear implication from the provision in section 8, exempting the husband from liability upon the wife's contracts or bargains in respect to property purchased by her, is that she may bind herself personally by such contracts, and a contract to pay the consideration of land conveyed to her is, I think, a contract in respect to property coming to her by purchase, within the meaning of the statute.

The conclusion is that under the statutes as they now exist a married woman, as incident to her right to acquire real and personal

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property by purchase and hold it to her sole and separate use, may purchase property upon credit, and bind herself by an executory contract to pay the consideration money, and that her bond, note or other engagement given and entered into to secure the payment of the purchase price of property acquired and held for her separate use may be enforced against her in the same manner and to the same extent as if she were a *feme sole*, and that her liability does not depend upon the proof or existence of special circumstances, but is governed by the ordinary rules which determine the liability of persons *sui juris* upon their contracts.

The judgment should be reversed and a new trial ordered.

All concur. MILLER and EARLE, JJ., absent at argument.

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JOHN C. HOLLEMBAEK, TRUSTEE, &C., ET AL.,  
PLAINTIFFS AND APPELLANTS, v. JOHN H.  
MORE, ET AL., DEFENDANTS AND RESPONDENTS.

TRUSTEE AND CESTUI QUE TRUST.

The estate of a *cestui que trust* is liable and can be held for the fraud of a trustee, by a purchaser of the trust property itself for a full and fair price without notice or knowledge of the trust.

The contribution of trust property to the capital stock of a copartnership at the time of its formation, by a trustee, as his own property, and so contributed without notice or knowledge to the other copartners of the fact of its being trust property, is closely analogous to its sale and purchase. There is but little if any difference in principle.

In such case the *cestui que trust*, seeking his property (thus converted) from copartnership assets, can only claim and take therefrom what his trustee would be entitled to take had he been vested with absolute ownership of the funds invested by him in the copartnership, instead of holding the same as he did merely in trust.

The equities of the copartners of a trustee, dealing with him as the absolute owner of the property contributed by him to the copartnership, and without notice or knowledge of any trust relations

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Statement of the Case.

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in regard to the same, are paramount to those of the *cestui que trust*, in regard to such property.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 6, 1878.*

This is an appeal from an order overruling the plaintiff's demurrer to the second and third defenses set up in the separate answer of the defendants, Thomas B. and John H. Rand.

It appears from the complaint, that the plaintiffs are the trustees and *cestuis que trust*, under the will of Noah Burnham, late of Concord, in the county of Merrimac, and State of New Hampshire, deceased, who died in August, 1857, leaving a will, whereby his residuary estate was devised and bequeathed to his executors, therein named, in trust to pay over the income thereof to his widow, during her life, and under certain conditions therein named, to pay certain portions of said estate to his children, Andrew J., Martha L. and Elizabeth A., and, upon the death of the said widow, to pay the same to his said children, and to the survivors of them. The will was duly proved by the executors and trustees therein named, who thereupon assumed the duty of executing its provisions. Such executors and trustees were afterward duly and legally removed from office, without having fully executed such trusts, and are now deceased. Andrew J. Burnham, one of the children of the testator, and a beneficiary under the said trusts, is also deceased. On November 22, 1863, the defendant, John H. More, was appointed administrator *de bonis non*, of the estate of the said Noah Burnham, deceased, by the judge of probate of the county of Merrimac, in the State of New Hampshire, and by virtue of such appointment acquired possession of the

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Statement of the Case.

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estate, so far as it then remained unadministered. No debts of the testator remain unpaid. The specific legacies have been discharged, and all the residue of the estate, which came to the hands of the defendant, More, was, and is, chargeable with the trusts created by the will.

On December 5, 1868, More, and one Holly, purchased the unexpired lease, furniture and business of the St. Cloud Hotel, in the city of New York, and thereafter, as copartners equally interested, carried on the business of said hotel until September 17, 1869. All, or nearly all, of the capital invested by More in such purchase and business consisted of the trust funds, to the income whereof, under the will of Noah Burnham, deceased, his widow was, and is, entitled, during her life, and to which his surviving children are, or will be, entitled upon her death.

On September 17, 1869, the interest of Holly in the property and business was transferred to the defendants Rand. More still retained the undivided interest therein, which he had acquired by virtue of his joint purchase with Holly, and the business was afterward carried on by More and the two Rands, as copartners; but under an agreement, whereby their respective interests in the copartnership property were defined and limited, as follows, viz.: the interest of the said John H. More was to be twenty-nine undivided sixtieths, and the interest of the Rands was to be thirty-one undivided sixtieths. The business of the said hotel was carried on by the defendants, More and Rand, jointly, for some time; but, before the commencement of this action, a suit was instituted between them by More for a dissolution of their copartnership and the distribution of its assets.

On September 22, 1876, the plaintiff Hollembæk, was, by an order of the supreme court of the State of New York, duly appointed trustee of the trust estate

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created by the will of Noah Burnham, deceased. The said trust estate is capable of being traced to, identified and distinguished in, the investment made by More in the said hotel and in the business carried on by him in connection with the defendants Rand.

The plaintiff, Hollembæk, as such trustee, claims to be entitled thereto, and to such a proportionate share of the profits of the said business as the trust estate represented in the enterprise ; or, at his option, if for the interest of his *cestuis que trust*, to be repaid the amount of the said trust funds invested therein, with interest thereon.

The complaint contains no allegation impugning the action of More in making the purchase of the hotel property with the funds of the trust estate, as a misappropriation thereof, nor is it averred that the Rands had any notice or suspicion, or reason to suspect or believe, when their interest in the said property and business was acquired, and when their partnership relations with More were entered into, that the interest of More had been purchased with money which he held in trust, or that he was not the absolute and *bona fide* owner thereof, in his own right.

The second and third defenses set up in the separate answer of the Rands, state in substance that they acquired this interest in the property, in good faith, under a written contract with More and Holly made on September 17, 1869, and paid to Holly \$31,000 as the consideration of the transfer to them of his undivided share therein, without any knowledge or notice that More was not the true and absolute owner of the interest therein to which he claimed to be entitled.

The defendants Rand further allege that they were induced to make such purchase, and to enter into the said agreement of September 17, 1869, under which they acquired title and became interested in the property, and copartners with More in the business, by

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false and fraudulent representations made by More, as to the profits of the said hotel business previously realized, as well as by certain promises and agreements in reference to the conduct thereof which he wholly failed to perform, and that but for such representations, promises and agreements, they would not have made such purchase, nor entered upon the said business. They further allege that by reason of the premises they have sustained great loss and damage. And they claim that if the plaintiffs are entitled to any relief in this action, they can only reach the interest of More, in the copartnership assets and effects, after the same shall have been equitably determined upon an accounting as between him and themselves, in which the damages thus sustained by them shall be allowed to enter.

To the second and third defenses thus set up, the plaintiffs demurred, on the ground that they were insufficient in law to constitute a defense or counter-claim.

On the trial of the issue of law thus raised, it was ordered that the said demurrer be overruled with costs.

From that order the plaintiffs appeal.

*Robert S. Green*, for appellants.

*Sandford R. Ten Eyck*, for respondents.

BY THE COURT.—SANFORD, J.—The matters set up in the second and third separate defenses of the answer of the defendants Rand, to which the plaintiffs demur as insufficient, either by way of defense or counter-claim, are not asserted as constituting a cause of action against the plaintiffs, or as affording good ground for any affirmative relief. They are relied upon as constituting equitable defenses against the demand of the plaintiffs to be indemnified out of the partnership assets and effects, for the entire amount of the trust fund in-

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vested by More in the partnership business, with interest thereon, irrespective of any question of profit or loss in said business, and without regard to the rights and interests of the defendants Rand in the partnership assets and effects, as between said defendants and their copartner More. The plaintiffs contend that they are entitled to be repaid from the partnership property of the defendants, the amount of the trust fund invested therein by More, with interest, or that, if they shall so elect, they may take, at their option, such proportionate share of the property and profits as the trust estate represented in the enterprise. The defendants Rand, on the other hand, insist that as they acquired their interest in the property and business at More's instance, and upon his representations and agreements, without any knowledge or notice of the rights or claims of the plaintiffs to the moneys invested by him, their equities are paramount, and that, in the adjustment and distribution of the partnership assets, their rights and claims as against More should be fully protected, before those of the plaintiffs are allowed to be enforced. The facts alleged in the defenses demurred to were intended to raise this question, and it is this question, principally, which has been presented and discussed on the argument. If, upon the facts stated, the plaintiffs' claim to the trust moneys invested in the partnership property by More, is to be subordinated to the rights of the defendants Rand, as between More and themselves, then those facts are properly averred by way of equitable defense, and the demurrer cannot be sustained. If, on the other hand, the plaintiffs are entitled to trace their funds into the assets of the partnership to their full extent, or even to the extent of the nominal share or interest therein of More, irrespective of any settlement and accounting as between him and the defendants Rand, then the claims of said defendants, founded on his alleged frauds upon, and

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his breaches of contract with them, are irrelevant and immaterial. In an action for an accounting between the defendants More and Rand with respect to the copartnership between them, the facts averred in the separate defenses now under consideration, were held by the court of appeals to be available in favor of the Rands by way of counter-claim against More, for the reason that the action was, in a general sense, founded upon the contract of September 17, which provided contingently for the copartnership subsequently created, and the fraud of More, in inducing the defendants Rand to enter into that contract, might be regarded as a cause of action in their favor against the plaintiffs, arising out of the contract upon which the action was founded (*More v. Rand*, 60 *N. Y.* 212).

The court declined to consider whether independently of the code such a cross defense would be entertained by a court of equity in an action for the dissolution of a copartnership, but cited authorities tending to support the affirmative of this question, and asserted, broadly, that the policy of the law in recent times allows parties to bring into a single action, so far as it can conveniently be done, all the controversies between them, for final and complete adjustment. An examination of the authorities so cited has satisfied me, that the facts alleged in the defenses demurred to would be good in equity, as constituting a proper and available cross defense as between the defendants and More, in a suit for the settlement and adjustment of their partnership affairs, and that the exclusion of those facts from consideration in such a suit would result in hardship and injustice (See especially *McKenna v. Parker*, 36 *L. J., Eq.*, 366). The same must be true, with reference to the claim of the plaintiffs in this suit, unless the equities in their favor are paramount to those of the defendants. It is conceded that the estate of a *cestui que trust* is liable and can be



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held for the fraud of his trustee, by a purchaser of the trust property itself for a full and fair price, without notice of the trust. The contribution of trust property to the capital stock of a copartnership at the time of its formation is closely analogous to its sale and purchase. The other partners make their contributions and enter into their engagements on the faith of it. They become vested for a good and valuable consideration with the legal title to it. There would seem to be but little difference, in principle, between a contract of sale and a contract of partnership, upon this particular question. The equity of the defendants arises out of the fact that More had the legal title and possession, with all the evidences of absolute ownership, and that the defendants Rand were not only without actual knowledge or notice of the trust upon which he held the property, but were in no way put upon inquiry with respect to his title to it.

In such case, the same principle would seem to be applicable which has controlled in bankruptcy, where the general rule is, that if some of the members of a firm apply moneys, which they hold in trust to partnership purposes, with the knowledge of the firm, the trust still attaches; the firm are responsible for the transaction and hold the moneys either as trustees or as debtors to the *cestui que trust*. In cases of this nature, the *cestui que trust* has a right to have the subject of the breach of trust restored to him in the manner most beneficial to himself, and consequently to consider it either as a debt of the firm from the time the breach of trust took place, or to be made good *in specie*, as he shall elect (*Collyer on Partn.* § 456). But where a partner lends trust money to his firm, his *cestui que trust* do not become creditors of the firm, and are not entitled to share as such in the distribution of its assets unless the fact of its being trust money is known to the other parties (Jacques v.

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Marquand, 6 *Cowen*, 497; *Exp. Heaton, Buck*, 386; *Exp. Apsey*, 3 *Br. Ch.* 265; *Exp. Watson*, 2 *Ves. & Beam.* 414; *Willett v. Stringer*, 17 *Abb. Pr.* 152).

The individual interest of the partner who has been guilty of the breach of trust can alone be resorted to, and that is only to be ascertained upon a final settlement and adjustment of the partnership estate as between the partners. The equities in favor of the other partners are stronger where the trust funds are not merely loaned to the partnership, but are contributed as capital upon a good consideration; and, especially, where, as in this case, the right of the partner to appropriate them is not in terms impugned, and no breach of faith, or misappropriation is charged upon or imputed to him. The action of More in originally investing the trust moneys in the joint purchase with Holly of the St. Cloud Hotel is not disaffirmed by the plaintiffs, nor do they in anywise repudiate or disavow the contract of September 17, between More and Holly and the defendants Rand. I am of opinion, that they are bound by the terms of that contract, and that, inasmuch as the Rands, in an action founded upon that contract, may avail of the facts alleged in the defenses demurred to, by way of defense or counter-claim against More, so should the plaintiff be held in the present action, so far as the partnership property is concerned, to a like accountability for the frauds of More, in inducing the defendants to enter into that contract. In other words, they should only be permitted to withdraw from the copartnership assets what More might have withdrawn had he been vested with the absolute ownership of the funds invested therein, instead of holding them, as he did, merely in trust.

The order appealed from should be affirmed with costs.

CURTIS, Ch. J., concurred.

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Statement of the Case.

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SARAH A. CHAMBERLIN, ADMINISTRATRIX,  
&C., PLAINTIFF AND APPELLANT, v. AMOS S.  
CHAMBERLIN, IMPLEADED, &C., DEFENDANT  
AND RESPONDENT.

COPARTNERS, EQUITY BETWEEN.

REDEMPTION OF MORTGAGE, WHO CAN CLAIM IT.

If a partner take a lease of lands in his own name for the purposes of the partnership, he will be considered in equity a trustee of such lease for himself and his copartners (*Collyer on Part.* § 160, and cases there cited). But in *Otis v. Sill* (8 Barb. 102), where a lease was taken by one member of a firm in his own name, there being no evidence that it was taken for the firm and with express reference to its business, beyond the facts that the partnership commenced at the date of the lease and was carried on upon the demised premises, it was held that the lease did not belong to the firm, and it was also held that parol evidence was inadmissible to show that the lease was executed for the benefit of the firm, for the reason that by such evidence it was sought to create a trust in real estate by parol, which was prohibited by statute (2 R. S. 135, § 6).

There is no presumption that a leasehold, standing in the name of one of several copartners, and used by the firm for their business, constitutes partnership assets. The presumption is otherwise. Its mere use for partnership purposes does not operate to divest or affect the legal title.

If, however, it be made to appear that real estate and chattels real standing in the name of one of a firm, does in fact belong to the partnership, equity will treat it as such, and will decree the person holding it to be a trustee for those beneficially interested, but it must appear that such real estate has been so treated, and was purchased and held for partnership purposes and account, or in some form voluntarily subjected by the legal owner to the equitable rights and liens of all the partners and partnership creditors.

No person can invoke the aid of a court of equity for a redemption of a mortgage, except he who is entitled to the legal estate of the mortgagor or who claims a subsisting interest under him (*Grant v. Duane*, 9 Johns. 591).

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Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 6, 1878.*

Appeal from a judgment entered in favor of the defendant, and against the plaintiff, for \$654.56 costs, on a dismissal of the complaint, after a trial of issues of fact at special term, by the court without a jury.

The action is in the nature of a bill in equity, filed by the plaintiff as administratrix of her deceased husband, to have the right, title, and estate of the defendant in and to certain renewal leases, the originals whereof were held by him under an assignment absolute on its face, adjudged and declared to be defeasible by redemption; and for the redemption of such leases on payment by the plaintiff to the defendant, of whatever, if anything, upon an accounting, should be found to be due from the estate of plaintiff's intestate to the defendant, as the mortgagee of said leases.

It appeared, by the evidence, that the leasehold premises in question were demised to Elijah Chamberlin, by two indentures of lease, bearing date July 19, 1844, for the term of twenty-one years from August 1, then next ensuing. The said Elijah Chamberlin and his son, John P., the plaintiff's intestate, were then copartners in business, and upon the execution and delivery of such leases they entered upon the demised premises, and continued in possession thereof, carrying on the copartnership business until August, 1859, when the right, title and interest of Elijah Chamberlin in said leases and the premises thereby demised were sold, under decree in foreclosure, to Messrs. Cain, Ward, Cole and Jessup, creditors of Elijah Chamberlin, and lienors upon the demised premises, two of whom, Cain and Ward, were plaintiffs in the foreclosure suit.

Prior to such sale an oral agreement was made be-

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tween the said purchasers, John P. Chamberlin, the plaintiff's intestate, and the defendant, to whom at the time, Elizabeth and John P. Chamberlin were largely indebted, that the said purchasers or one of them should buy in the property at the sale, hold it for five years or until their claims were sooner discharged in full by the payment of \$200 per month, as rent, or otherwise; and, at the expiration of five years, or earlier at his option, transfer the leases to the defendant, upon payment by him therefor of any sum that might remain unpaid of their claims; after which the defendant should hold the property, until reimbursed for his outlay, if any, and until his own then existing claims against John P. Chamberlin were discharged, when the leases were to be transferred to him. Pursuant to this understanding, the purchasers named bought the two leases and the right, title and interest of Elijah Chamberlin in the premises, at the foreclosure sale, and acquired title thereto, by deed, absolute on its face, dated August 13, 1859. Their claim against the property then exceeded \$11,000. The defendant then paid them \$2,000 on account, reducing it to about \$9,000. On September 27, 1859, they entered into an agreement in writing with the defendant, whereby they promised, at any time during the term, to assign to him or his legal representatives the said leasehold premises, for a sum equal to \$9,670, with interest from August 1, 1859, and upon such sale to allow, as part of the purchase money, all payments of rent which he might make for the use of the premises, from August 1, 1859, with interest on such payments, first deducting therefrom, however, all taxes, assessments, and expenses, incurred by them, with interest thereon. On July 26, 1864, the said purchasers, Cain, Ward, Cole, and Jessup, assigned to defendant the said leases.

At the time of such assignment there was due to

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his assignors, of the money for which they held the leases as security, \$4,000, and this amount the defendant paid. John P. Chamberlin was then in possession; and, as the tenant of the defendant, at a rental of \$200 per month, continued to occupy the premises until his death. He never paid to defendant the indebtedness due him, and which existed when the said oral agreement with respect to the transfer of the leases to defendant was made; nor the \$4,000 advanced by the defendant on receiving the assignment of said leases, in August, 1864. He was never able to make such payment. He owned no property, left no estate, and died insolvent on November 9, 1867. The defendant paid \$200 per month to his assignors of the leases, for five years, to August, 1864, for which, however, he was reimbursed by plaintiff's intestate, and paid ground rent to the lessors, up to the time of commencing this action. In August, 1864, there was due to the defendant, from said intestate, about \$15,000.

The findings of the judge before whom the cause was tried, were substantially in accordance with the facts as above stated, so far as these facts are necessary to support the judgment. He also found, specifically, that the leasehold estate mentioned in the complaint, was the individual property of Elijah Chamberlin, until August, 1859, when his interest therein was sold under foreclosure. His conclusion of law was, that the defendant should have judgment that the complaint be dismissed.

The plaintiff filed exceptions (1) to the finding of fact, that the leasehold estate mentioned in the complaint was the individual property of Elijah Chamberlin, until August, 1859; and (2) to the said conclusion of law.

The defendant now appeals from the judgment.

*Clifford A. H. Bartlett*, for appellant.

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Opinion of the Court, by SANFORD, J.

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*James M. Smith*, for respondent.

BY THE COURT.—SANFORD, J.—The evidence in the case sustains the finding of the learned judge, that the leasehold premises in question belonged to Elijah Chamberlin, and were his individual property, until August, 1859. The demise was to him, his executors, administrators and assigns, from August 1, 1844, for the term of twenty-one years thence next ensuing. William S. Chamberlin, a brother of the defendant, and of the plaintiff's intestate, testified, positively and without objection or contradiction, that his father, Elijah Chamberlin, owned the leases. There was no evidence to the contrary, unless it be by way of inference from the fact, not established by the evidence, but averred in the complaint and not denied in the answer. "that before and at the time of the execution and delivery of said leases, a copartnership existed between the said Elijah Chamberlin, and his son, John P. Chamberlin, and upon the execution and delivery of said leases, the said Elijah Chamberlin and John P. Chamberlin entered upon the said demised premises and occupied the same, for the carrying on, in and upon said premises, of the partnership business."

There is no evidence in the case, nor does the complaint aver, that the leases were taken by Elijah Chamberlin for the firm, or with express reference to the partnership business; nor does it appear what were the precise relations of the copartners to each other with respect thereto, nor whether the rent thereby reserved was paid out of copartnership funds, nor what credits, if any, were made to Elijah, on the partnership books, for the use of the property.

In *Collyer on Partnership* (§ 160) it is said that if a partner take a lease of lands in his own name, for the purposes of the partnership, he will be considered, in equity, as a trustee of such lease for himself and his

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copartners, the lease being deemed an incident of the copartnership. *Forster v. Hall* (5 Ves. 308), is cited in support of the proposition. In that case, Lord ALVANLY held, upon evidence afforded by letters of the lessee, and entries in the partnership books, that there had been a declaration of trust for the partnership, in writing, within the requirements of the statute of frauds; and he, therefore, declared the lessee to be a trustee for himself and his copartners. The decree was affirmed, on appeal, by Lord LOUGHBOROUGH, who proceeded, however, upon different grounds. He considered the evidence which had been adduced for the purpose of raising a trust in the lessee for himself and the plaintiffs, as conclusive of the existence of a partnership between them, and, the fact of partnership being established, that the lessee having taken the lease for the purposes of the partnership, took it as trustee for himself and his copartners, by operation of law, uncontrolled in any manner by the statute.

But in *Otis v. Sill* (8 Barb. 102), where a lease was taken by one member of a firm in his own name, there being no evidence that it was taken for the firm and with express reference to its business, it was held that the lease did not belong to the firm, although it appeared that the partnership commenced at the date of the lease, and that the partnership business was carried on upon the demised premises. It was also held that parol evidence was inadmissible to show that the lease was executed for the benefit of the lessee and his son, who was his copartner, for the reason that by such evidence it was sought to create a trust in real estate by parol, which is prohibited by the statute of frauds (2 R. S. 135, § 6).

There would, accordingly, seem to be no presumption that a leasehold, standing in the name of one of several copartners, constitutes partnership assets, notwithstanding that the partnership business is carried



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on upon the demised premises. The legal presumption is otherwise, and it must expressly appear that such was the purpose and intent of the parties, before a trust for all can be inferred. If, however, it be made to appear that real estate, including chattels real, does, in fact, belong to a partnership and constitutes part of its assets, in whosoever name it may stand, equity will treat it as such, and will decree the person in whom the legal estate vests to be a trustee for those beneficially interested. But real estate, to be so treated, must have been purchased for partnership purposes and on partnership account, or must in some form have been voluntarily subjected by the legal owner to the equitable rights and liens of all the partners and of the partnership creditors. Its mere use for partnership purposes, by the sufferance of the legal owner, does not operate to divest his title. While one of several copartners may not, during the existence of a continuing partnership of undetermined duration, secure to his individual use and benefit, without the knowledge of the others, the renewal or continuance of a lease of premises held and used by the firm (*Struthers v. Pearce*, 51 *N. Y.* 357), no principle of law or equity precludes copartners from severally taking title to land, either in fee or for a term of years, in respect to which no fiduciary relation between them exists; and neither nor any of them can claim the right to share with the other or others in the benefits to be derived from the purchase or tenancy of such land. Land thus acquired by one of several copartners may be appropriated, at his option, and during his pleasure, to the use of the copartnership upon such terms and conditions as may be agreed upon, but no inference is to be deduced from such use adverse to the title of him in whom the legal estate is vested. To defeat his apparent individual right it must affirmatively appear that he acquired and holds the title

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under circumstances upon which equity will fix its grasp for the purpose of declaring and enforcing a trust in favor of others beneficially entitled.

Unless the plaintiff's intestate had some estate or interest in the demised premises under the mortgagor, neither the purchasers under the foreclosure sale, nor their assignee, the defendant, ever stood towards him in the relation of mortgagee, and unless that relation existed, there can be no right of redemption. No person can come into a court of equity for a redemption of a mortgage but he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him (*Grant v. Duane*, 9 *Johns.* 591). In the absence of any such estate or interest, the plaintiff's intestate, under the oral agreement which existed between the purchasers at the sale, the defendant and himself, occupied no other or better position by reason of his partnership with Elijah Chamberlin, the owner of the equity of redemption, than he would have done, if an entire stranger. As between him and them, the contract was a mere executory contract for the purchase and sale of an estate or interest in lands, and was void by the statute of frauds (2 *R. S.* 135). No trust attached or was created in favor of the plaintiff's intestate, when the defendant entered into the written contract with the purchasers at the foreclosure sale, nor when he received from them the assignments of the leases (*Id.*). If, however, the contract were valid, or if, although void under the statute, its specific performance could be enforced in equity, by reason of its part performance by the defendant, of which there is no evidence in the case, unless his payment of rent to the defendant may be regarded in that light, specific performance could not be decreed, and no relief could be afforded to the plaintiff, for the reason that the payments required by the contract to be made, have

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neither been made nor tendered, nor offered to the defendant. "He who seeks equity must do equity."

The case is closely analogous in principle to that of *Levy v. Brush* (45 *N. Y.* 589), cited as a controlling authority in the opinion of the learned judge before whom the cause was tried.

There was no error in dismissing the complaint and the judgment should be affirmed with costs of the appeal.

CURTIS, Ch. J., concurred.

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LUCY I. SEYMOUR, PLAINTIFF AND RESPONDENT,  
v. GEORGE A. FELLOWS, DEFENDANT AND  
APPELLANT.

HUSBAND AND WIFE.

ASSIGNMENT DIRECT FROM FORMER TO LATTER.

*Witnesses, opinion of.—Falsus in uno, falsus in omnibus.*

Transfers of personal property made by husband direct to wife, without intervention of an intermediate party, are valid, as between themselves.

Choses in action may pass by delivery from one to the other, even without a written assignment (*Lockwood v. Cullin*, 4 *Robt.* 129; *Mack v. Mack*, 3 *Hun*, 323).

An opinion of a witness as to the value of services, should be based either upon the statement of another witness who has testified as to his actual knowledge of the amount and character of the services, or upon a hypothetical case including some or all of the facts proven (*Mercer v. Vose*, 67 *N. Y.* 56).

Where the evidence of witnesses requires to be reconciled, because different inferences may be drawn from such evidence, an opinion of a witness as to value, based or founded solely upon the fact of hearing such evidence read, is incompetent.

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The question must be so stated that the witness shall have in his mind a definite state of facts (Reynolds v. Robinson, 64 N. Y. 589). The facts in the present case readily distinguished from those in the last cited case.

The maxim *falsus in uno falsus in omnibus* is not of universal application.

The uncontradicted testimony of even a forsworn witness, if corroborated, must not necessarily be utterly rejected and disregarded.

The true rule is that the jury is at liberty to reject utterly the testimony of a witness who has deliberately sworn falsely in regard to any material fact in the case, except in so far as he is corroborated by other credible witnesses, or by necessary inferences from undisputed facts.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 6, 1878.*

Appeal from a judgment entered on a verdict in favor of the plaintiff, and from an order denying defendant's motion, made on the minutes for a new trial.

The action was brought to recover the value of work, labor and services, alleged to have been rendered by plaintiff's husband and assignor to the defendant, at his instance and request; and also a commission of five per cent. upon sales effected by the plaintiff's husband and assignor for the account and benefit of the defendant, under an agreement between them that he should receive such commission by way of compensation for effecting such sales.

The defendant by his answer admitted that he agreed to pay the plaintiff's assignor a commission of five per cent. on sales made by him, but denied all other allegations of the complaint. A set-off to the extent of \$500 was averred by way of affirmative defense.

Exceptions were taken to the rulings of the court during the trial upon questions of evidence. Also to

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the charge, and to the refusal of the court to charge as requested.

The jury rendered a verdict in favor of the plaintiff. Defendant's motion on the minutes that the verdict be set aside and a new trial granted was denied. The present appeal is taken both from the judgment and from the order denying such motion.

*Scudder & Carter*, for appellant.

*G. V. N. Baldwin*, for respondent.

BY THE COURT.—SANFORD, J.—The defendant contends that the plaintiff's title to the claim in suit is invalid, because acquired by assignment directly from her husband. While a different rule might prevail, if the rights of the husband's creditors were concerned, transfers of personalty made by husband to wife, are sustained as valid between the parties, and choses in action are held to pass by delivery from one to the other, even without a written assignment (*Lockwood v. Cullin*, 4 *Robt.* 129 ; *Mack v. Mack*, 3 *Hun*, 323).

The principal issue in the case was whether, by agreement between the defendant and the plaintiff's assignor, the compensation of the latter, for whatever services he should render, was to be limited to a commission of five per cent. upon the amount of such sales as he should effect, or whether he was to receive such commission upon sales in addition to the fair and reasonable value of his other services. Upon this issue, there was conflicting evidence. The plaintiff's assignor testified, in substance, that the general charge of the business of defendant, as assignee of the firm of John F. Seymour & Co., of which witness, prior to its failure, had been a member, was for four months and a half entrusted to and devolved upon him, by the defendant ; and that, during that period, he attended to the correspondence and collections, had charge of the

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Opinion of the Court, by SANFORD, J.

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money drawer, paid the clerks, and took an account of stock. That the defendant expressed reluctance to paying him a salary, because creditors might object, but nevertheless agreed to pay him for his work, and distinctly said that he would do so ; and as a separate matter, also agreed to pay him five per cent. for selling goods.

On the other hand, the defendant testified that shortly after the assignment he informed the plaintiff's assignor, and his two partners in the firm of John F. Seymour & Co., that the stock of goods was small, and that he could pay them no more than five per cent. for selling. That nothing was said about salary, or about any payment for services, excepting such commissions. On his cross examination, he testified that he told them positively, he would pay only five per cent. commission for any services they rendered. The defendant was corroborated, in respect to the alleged arrangement between himself and the members of the firm of John F. Seymour & Co., with respect to commissions, by two other witnesses, one a member of that firm, each of whom testified, in effect, that the compensation of the former partners was by express agreement to be limited to a commission of five per cent. upon sales, but it appeared that compensation, in excess of such commission was, in fact, paid by defendant, to one or more of them, and was charged as so paid upon the defendant's books. Moreover, the plaintiff's assignor testified, without contradiction, that after the suit was brought the defendant said to him : "I did enough to pay you for your first month's work. I think that is all you ought to have asked." It appeared, in evidence, that the defendant had retained, on account of his services, \$358.15, out of cash that came to his hands in the course of the business, as appeared by entries in defendant's books.

The court submitted to the jury the question of fact

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involved in this issue, directing their attention to the numerical excess of witnesses in behalf of the defense, but observing that there were facts and circumstances, which rendered it eminently proper that the question of the credibility of all the witnesses should be disposed of by them. There is nothing in the case to warrant or suggest a suspicion that in arriving at a conclusion the jury were biased or prejudiced, or that their deliberations were conducted otherwise than in perfect fairness and good faith. The verdict should not be disturbed as unsupported by, or as against the weight of evidence. *Testes ponderantur non numerantur*. The value of the plaintiff's services was proven by himself and by two other witnesses, each of whom testified that they had heard his testimony as to what he did. They were then asked, what in their opinion his services were worth. Objection having been taken to the question, because the witness was asked to fix the value from what Seymour said the services were—the witnesses were instructed to leave out of view the estimate of value given by Seymour, and from his statement of the services, to say what they were worth. The objection is that the question was not based upon a hypothetical statement of facts, but that it accorded to the witness the province of determining what services were rendered, and then of fixing their value. An opinion as to the value of services should be based either upon a witness's knowledge of the facts, or upon a hypothetical case, including some or all of the facts proven (*Mercer v. Vose*, 67 *N. Y.* 56). Where the evidence of witnesses requires to be reconciled, and when different inferences may be drawn from such evidence, an opinion as to value, founded solely upon hearing such evidence read, is incompetent (*Reynolds v. Robinson*, 64 *N. Y.* 589). The question must be so stated that the witness shall have in his mind a definite state

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of facts, so that the province of the triers shall not be interfered with (*Ib.*).

I am of opinion that this salutary rule was not infringed by the questions now under consideration. In the case last cited, the witness had heard the testimony of two physicians, in regard to a malady with which the defendant's testator was afflicted, and had heard read the testimony of the plaintiff's wife in regard to the nature and extent of her care, nursing and attendance upon him, during the last six years of his life. The question contained no reference to any particular portion of the evidence, and called generally for the witness's opinion as to the value of the services rendered by plaintiff's wife in nursing said intestate during that period. Under the particular form of the question addressed to him, the witness was called upon to determine, from the evidence, and in view of the testimony of a medical expert, the nature, extent and importance of the services which had been rendered, and thereupon to estimate their value. In the case at bar, the testimony of the plaintiff's assignor as to his services was very brief and direct. The witnesses were particularly directed to confine themselves to that testimony, and upon that basis to express an opinion. This was equivalent to an inquiry as to the value of certain services, supposing them to have been rendered as stated. It did not devolve upon the witness the duty of determining whether they were so rendered or not. In the case of *McCollum v. Seward* (62 *N. Y.* 316), a witness was asked, "What were his (the plaintiff's) services, as he describes them, worth a month, taking the whole year round?" The court of appeals was of opinion that an objection, similar to that now taken, was not tenable; although it recognized and affirmed the principle upon which that objection was urged. It held that the witness was not called upon to determine the truth of the facts deposed to,



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before giving an opinion, but only for an opinion to be given hypothetically, upon the assumption that the facts stated were true. I think the present case precisely analogous, and that both cases may be readily distinguished from that of Reynolds v. Robinson (*ut supra*), where the witness was, in some sense, required to determine from the evidence, first, what services the plaintiff did, in fact, render, and thereupon to estimate their value.

The evidence of both witnesses upon their cross examination, under hypothetical questions addressed to them by the defendant's counsel, was highly favorable to the defense, and on the whole, could not have prejudiced the defendant. I think the ruling was not erroneous, but even if technically it were so, the error is not one which under the circumstances warrants a reversal.

In response to a specific request on the part of the defendant to charge "that if the jury believe the plaintiff's assignor has willfully testified falsely in any particular, he is unworthy of credit," the court charged that undisputed testimony was always entitled to credit, but that the credit of a party (witness) would be destroyed by a willfully false statement, important to the case.

Exception was taken to this qualification of the defendant's request. The proposition contended for, without any qualification, was untenable. The maxim "*falsus in uno, falsus in omnibus*," is not of universal application. The jury are to be the judges of the credibility of witnesses, and the uncontradicted evidence of even a forsworn witness, if corroborated, is not necessarily to be utterly rejected and disregarded. The true rule is, that the jury are at liberty to reject utterly, the testimony of a witness who has deliberately sworn falsely in regard to one material fact, except in so far as he is corroborated by other credible witnesses,

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or by necessary inferences from undisputed facts. It should appear that a witness has committed, or is capable of *perjury*, before it can be said that he is unworthy of any credit. The jury are not absolutely bound to reject undisputed evidence, duly corroborated, or which accords with the probabilities of the case, because it comes from the mouth of a witness, who, upon a collateral question, not material to the issue, has been guilty of willful misrepresentation. While such a misrepresentation may affect credibility, it will not necessarily entirely discredit a witness.

The materiality of the matter as to which one shall willfully and corruptly swear falsely, is essential to constitute perjury (2 *R. S.* 681). The court qualified the defendant's proposition, by charging that the credit of a party (witness) would be destroyed by willful falsehood, "if important (that is, material) in the case." There was no error in the rule as adopted and laid down by the court (*Wilkins v. Earle*, 44 *N. Y.* 172, 182; *Brett v. Catlin*, 47 *Barb.* 404, 407; and see authorities collected in note to *Koehnecke v. Ross*, 16 *Abb. Pr. N. S.* 345).

Other exceptions referred to in the points of counsel are not deemed tenable.

The judgment and order appealed from must be affirmed with costs.

CURTIS, Ch. J., concurred.

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Statement of the Case.

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HERBERT B. FREEMAN, PLAINTIFF AND RESPONDENT, v. JOHN M. FALCONER, IMPEADED, &C., DEFENDANT AND APPELLANT.

PROMISSORY NOTE, LEGAL OWNER OF.

OPARTNERSHIP, LIABILITY OF FORMER MEMBER THEREOF, WHO ALLOWS HIS NAME TO BE USED AND CONTINUED AS IF HE WAS AN ACTUAL MEMBER OF THE FIRM.

In the absence of *mala fides* in a plaintiff's possession of promissory notes, indorsed in blank or specially to himself or his own order, the legal title is in him, and he is legally the real party in interest, and can maintain an action on the same, even though it appears that the transfer is merely colorable as between the parties (See cases cited in *Hays v. Southgate*, 10 *Hun*, 511; also *Sheridan v. The City of New York*, Court of Appeals, see 4 *N. Y. Weekly Dig.* 28).

Where the relations of a partner to his copartners have been terminated, yet his name was continued in the name and style of the firm formed by his former copartners with his knowledge, sanction and approval,—*Held*, that he was liable on the contracts and obligations of the firm so using his name as if he had actually continued as a member and partner thereof.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 6, 1878.*

Appeal from a judgment entered on a verdict in favor of the plaintiff; and from an order denying defendant's motion, made on the minutes, for a new trial.

The action was brought upon two promissory notes in writing, made by J. M. Falconer & Co., to the order of Manning, Bowman & Co., and by them specially indorsed to the order of the plaintiff. The separate answer of the defendant, John M. Falconer, who alone

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appeared, put in issue all the allegations of the complaint, and averred, by way of affirmative defense, that the notes were the property of Manning, Bowman & Co., who were the real parties in interest, and ought to be plaintiffs.

Upon the trial it appeared that the notes in suit were made by the copartnership firm of J. M. Falconer & Co., to the order of Manning, Bowman & Co., who specially indorsed them to the plaintiff, and directed payment thereof to his order.

The defendant, John M. Falconer, offered to prove that the payees named in the notes, Manning, Bowman & Co., were the real owners thereof, and that plaintiff held them merely as their agents, and for the purpose of collecting and remitting the proceeds.

The evidence was excluded and the defendant excepted.

The defendant, Falconer, testified, without contradiction, that he ceased to be a member of the firm of J. M. Falconer & Co., about November 1, 1875, when his partners, Barrowcliffe and Manly, bought out his interest in the firm at a sheriff's sale, under execution, and afterward continued the business in the same firm name of J. M. Falconer & Co. He further testified, that he was in the employ of the firm, giving it the use of his name and skill, at a salary. The notes were made in February, 1877.

Evidence was offered tending to show a compliance by Barrowcliffe and Manly with the statute "allowing the continued use of copartnership names in certain cases" (*Laws of* 1854, ch. 400; 1863, ch. 144); but it did not appear that the case was within the statutory requirements. There was no evidence that the firm of J. M. Falconer & Co. ever had business relations with foreign countries, or that, when the defendant ceased to be a member of it, it had transacted business in this State for a period of five years.

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Opinion of the Court, by SANFORD, J.

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The defendant requested the court to direct a verdict in his favor, on the ground that he was not a member of the firm of J. M. Falconer & Co. when the notes were made, and was, therefore, not liable thereon. Also upon the ground that it appeared that the notes were the property of Manning, Bowman & Co., some evidence to that effect having been introduced without objection.

The court refused so to do, and an exception was taken.

The court charged the jury, in effect, that the statute did not authorize the continuance of the use of John M. Falconer's name by his former partners, after their purchase of his interest in the firm; and their subsequent use of his name, with his knowledge and approbation, rendered him liable for its use, as if he had used it himself. The court submitted to the jury the question whether the signature to the notes was genuine, charging that if it was, the defendant would be liable for the use of his name, inasmuch as it was used with his approval, in the same manner, and to the same extent, as if he had used it himself. Exception was taken to the charge in this respect.

*Thomas & Wilder*, for appellant.

*C. F. Wells*, for respondent.

BY THE COURT.—SANFORD, J.—Upon the question of the plaintiff's title to the notes in suit, and his right to maintain an action thereon, the weight of authority is adverse to the position contended for by the defendant. In *Hays v. Southgate*, 10 *Hun*, 511, the cases upon this point are collated and commented on, and it is laid down as the settled rule, established by numerous adjudications of the court of appeals, that in the absence of *mala fides* in a plaintiff's possession of

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promissory notes, indorsed in blank, or specially to himself or his own order, the legal title is in him, and he is legally the real party in interest. The most recent case cited is that of *Sheridan v. Mayor of New York*, not yet reported, but decided by the court of appeals, December 22, 1876 (4 *N. Y. Weekly Dig.* 28). It was held in that case, that if plaintiff have a valid transfer as against his assignor, and holds the legal title to the demand, payment to him will protect the defendant against any claim by the assignor. He is, in such case, the real party in interest, under the code, and can maintain the action, even though, as between the parties thereto, it appears that the transfer is merely colorable.

There was no error in the refusal of the court to direct a verdict for the defendant, nor in charging that the defendant's sanction and approval of the continued use of his name, by his late copartners, rendered him liable for the contracts of the firm. By allowing such use of his name, he held himself out to the world as a member of the firm, and it was wholly immaterial whether, as between himself and his co-defendants, there was a community of interest or not. If not partners *inter sese*, they were such as to all creditors who had dealings with them, without notice of their actual relations to each other. There is nothing in the case tending to show that the plaintiff, or the payees of the notes, from whom he derived title, had any notice or knowledge that the plaintiff was not a member of the firm, which carried on business under his name, with his consent and approval. The continued use of the firm name, by the defendant's associates, after he ceased to be interested therein, was not authorized by the statute (*Laws of 1863*, ch. 144), and the defendant is not protected from liability by the vain attempt of his associates to avail of, and comply with its provisions.

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The verdict is sustained by the evidence, and the defendant's exceptions are untenable.

The judgment and order appealed from, should be affirmed with costs.

CURTIS, Ch. J., concurred.

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THE SUN PRINTING AND PUBLISHING ASSOCIATION, PLAINTIFF AND RESPONDENT, v. THE TRIBUNE ASSOCIATION, DEFENDANT AND APPELLANT.

LICENSE TO ENTER UPON PREMISES FOR THE PURPOSE OF SHORING UP AND SUPPORTING BY PROPER FOUNDATIONS A WALL, IN ORDER TO ENABLE PARTY TO EXCAVATE ADJOINING PREMISES, PURSUANT TO CHAPTER VI. OF THE LAWS OF 1855.

The word "license" imports *leave, permission, sufferance, authorization*. It implies only the removal of legal restraint by a grant of permission. The necessary license is granted when it expressly *authorizes* "such acts to be done as may be necessary to enable the person to whom it may be given, to perform the duty which the statute in such a contingency creates" (*Sherwood v. Seaman*, 2 Bosw. 127).

EXCEPTIONS TO REFUSAL OF THE COURT TO CHARGE AS REQUESTED.

*Labor performed on Sunday.*

A general exception to the refusal of the court to charge as requested is untenable unless each and all of the several propositions submitted are sound in law, and applicable to the facts and circumstances of the case. If either of the propositions be erroneous, the objection is unavailing (See cases cited in opinion of the court).

Labor performed on Sunday is not *ipso facto* illegal. The statute excepts works of necessity and charity (2 R. S. 675, § 70. See also *Merritt v. Earle*, 20 N. Y. 115).

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Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 6, 1878.*

Appeal from a judgment entered on a verdict in favor of plaintiff, and from an order denying defendant's motion, on the minutes, for a new trial.

The action was brought to recover \$561.68, as money necessarily paid out and expended by the plaintiff, for the use and benefit, and at the express request of the defendant, in effecting the temporary removal of machinery in the plaintiff's building, in order to enable the defendant, while excavating the adjoining premises to a depth more than ten feet below the curb, to obtain convenient access to the plaintiff's wall, for the purpose of shoring it up and supporting it by proper foundations, pursuant to chapter 6 of the laws of 1855.

The issues raised by the pleadings were (1) whether "the necessary license to enter," required by the statute above referred to, was afforded—the defendants insisting that the removal of such machinery by the plaintiff was essential thereto; (2) whether such removal was effected voluntarily by plaintiff, as an essential element of the license to enter required by the statute, or at the request and upon the express or implied promise of the defendant to make compensation therefor; (3) whether the sum alleged, or any amount whatever, was expended by plaintiff to or for the use of the defendant, in and about the removal of such machinery; and (4) whether or not the services rendered in and about such removal were worth the sums alleged to have been expended therefor, or any sum whatever.

It appeared, upon the trial, that the plaintiff afforded the defendant license to enter on its premises, for the purpose of supporting the wall, and it was



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assumed and conceded that such license complied in all respects with the requirements of the statute, unless the removal of the machinery was essential to make it complete. The defendant contended that the license was incomplete without such removal by the plaintiff.

The court charged the jury, in substance, that if the services in question were rendered by the plaintiff, at the request of the defendant's business manager, previously made, and upon his promise, on the part of the defendant, to pay for the same when rendered, the defendant would be liable therefor. That if the request was not made before the work was done, the defendant would not be liable. That if entitled to recover, the plaintiff could only recover the reasonable value of such services as were necessary for the removal and restoration of the machinery; and that no extra compensation should be allowed for work done at night or on Sunday, unless the defendant specially requested that the work should be done expeditiously and at such times. No exception was taken to the charge as delivered, but the defendant did except to the refusal of the court to charge as requested: (1st) That the statute referred to in this case imposes a burden on the defendants which is in derogation of the common law, and must be construed liberally in favor of the defendant; (2nd) that "the license contemplated by the law, to be complete, must not only give the defendant the right to enter on the plaintiff's land, but must give the defendant proper and suitable space, without unreasonable obstructions, in which to do the work;" (3rd) that "the removal of the machinery being a part of the duty of the plaintiff, any promise made by the defendant for removing the machinery was without consideration and void; and (4th) that "the labor performed on Sunday being illegal and void, no promise to pay for it can be upheld."

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Opinion of the Court, by SANFORD, J.

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Exceptions were also taken to rulings of the court upon questions of evidence.

The jury rendered a verdict in favor of the plaintiff for \$250, with interest, \$52.50, amounting in the aggregate to \$302.

From the judgment entered thereon, and also from an order denying defendant's motion, made on the minutes, for a new trial, the present appeal is taken.

*Cornelius A. Runkle*, for appellant.

*Willard Bartlett*, for respondent.

BY THE COURT.—SANFORD, J.—The general exception taken by the defendant's counsel to the refusal of the court to charge as requested, is of course untenable, unless each and all of the several propositions submitted are sound in law and applicable to the facts and circumstances of the case. If either of such propositions be erroneous, the exception is unavailing. It presents no question for review (*Keller v. New York Central Railroad Company*, 24 *How. Pr.* 172; *Magee v. Badger*, 34 *N. Y.* 247). As the first request involved only proposed instructions to the jury in regard to the manner in which the statute was to be construed, the court very properly declined to comply with it. It was the duty of the court, not of the jury, to construe the statute; and it would have been error to have devolved upon the jury the duty of determining its import and meaning, with or without instructions as to whether it was to be strictly or liberally construed.

But there was no error in the construction of the statute which the court adopted in refusing the second and third requests preferred by the defendant's counsel.

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Opinion of the Court, by SANFORD, J.

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“The necessary license to enter on the adjoining land,” which under the provisions of the statute is to be afforded to “the person causing such excavation to be made,” comprehends and requires no action on the part of the licenser. The word “license” imports leave, permission, sufferance, authorization. It implies only the removal of legal restraint by a grant of permission. The necessary license must be deemed to be afforded, when it expressly *authorizes* “such acts to be done as may be necessary to enable the person to whom it may be given to perform the duty which the statute, in such a contingency, creates” (Sherwood v. Seaman, 2 Bosw. 127). Any interference with the plaintiff’s wall or with its machinery would have been a trespass, but for the withdrawal by license of those legal restraints which debarred the defendant from entering the building and doing there whatever was necessary to be done, in order to preserve the wall from injury, and support it by a proper foundation.

It is alleged in the complaint, although the evidence scarcely sustains the averment, that the wall could not be preserved and supported without the removal of the machinery. It appeared in proof that a space of from three to five feet extended along between the machinery and the wall. A witness on the part of the plaintiff testified that it was pointed out to the defendant’s employees that they could have entered and put their needles through, between the machines, without disturbing them at all, but they said they would do as they pleased, and the person employed by the defendants to support and underpin the wall, when asked whether, in his opinion, the work would have been done with the machines there, replied, “I would not have wanted to take the responsibility; no sir, not very well.” The fullest license, however, was accorded to the defendant to do whatever was deemed necessary; no restriction was imposed, and every courtesy and

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Opinion of the Court, by SANFORD, J.

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facility was extended. The objection is, not that the plaintiff did not *authorize*, but, that it did not *effect* the removal. Clearly if the removal of the machinery was not a matter of necessity, but merely a convenience to the defendants, the plaintiff was under no obligation either to remove it, or to authorize its removal; but, assuming the necessity of its removal, I am of opinion that all that the statute required, was that such access to the premises should be afforded, as would enable the defendant to do and perform whatever was necessary for effecting the proper preservation and support of the wall. Having such access, the duty devolved upon the defendant of doing all that was necessary, and having afforded such access the plaintiff was entitled to have all that was necessary done. If, therefore, the removal was effected by the plaintiff, at the request of the defendant and upon the express promise to pay for it, the defendant became liable for the reasonable value of all such work as was necessarily performed in effecting it.

The proposition involved in the fourth request is untenable, for the reason that labor performed on Sunday is not *ipso facto* illegal. The statute provides that there shall be no servile laboring or working on that day, excepting works of necessity and charity (2 R. S. 675, § 70). There was evidence in the case tending to show some necessity for doing, on Sunday, such part of the work as was done on that day. Again, only part of the work was then done. The evidence does not show that the parties to the contract contemplated or agreed that the work should be wholly performed on Sunday, nor was it done wholly on that day. Under the construction given to the statute in question, by the court of appeals, in *Merritt v. Earle* (29 N. Y. 115), I am not prepared to say that the contract was void, or that the defendant's promise to pay for work done under it cannot be upheld,

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merely because part of such work was done on Sunday. The court properly charged that extra compensation could not be recovered for work done on Sunday, or at night, unless the defendant expressly requested that it should be so done. The verdict was for less than half the amount claimed by the plaintiff, and less than half the amount that was proven to have been expended. As there was no conflict of evidence in regard to the amount expended, or the nature of the work, it may, perhaps, be assumed that the jury rejected the claim so far as extra compensation or compensation for Sunday work is concerned, the abatement being in excess of the amount charged for Sunday work.

It was insisted on the argument that the court erred in permitting evidence to be adduced as to conversations between the agents of the plaintiff and the defendant's general business manager Mr. Ford.

It appeared from the evidence that Mr. Ford was the general business manager of the defendant; that he was informed by the plaintiff's agent, that the plaintiff had been requested or ordered by persons in defendant's employ to take the machinery out of their way; that its removal would involve considerable expense, and that the plaintiff would look to the Tribune Association for reimbursement of the necessary expense; that he thereupon directed the plaintiff "to go ahead and send him the bills."

The objection is founded upon the alleged insufficiency of the evidence to show that Ford had authority to bind the defendant. It was expressly admitted on the trial that Ford was the defendant's business manager, and had been such since 1873, and it seems to have been assumed by counsel on both sides that this admission was broad enough to warrant the inference of full authority on his part, to make the contract upon which the action was based. I think it was. At

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Opinion of the Court, by SANFORD, J.

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all events, the point was not raised in such form as clearly to apprise the court that it was or would be relied on. The evidence was received upon the understanding that Mr. Ford's connection with the defendant should afterward be shown, and that unless his authority was shown it should be stricken out. Under the circumstances, its reception was a proper exercise of judicial discretion as to the order of proof. The defendant subsequently made the admission above referred to, which both parties seem to have regarded as entirely adequate. No motion was made to strike out the evidence of what occurred between Ford and the plaintiff's agent; and, when the defendant moved for a non-suit, the grounds urged in support of the motion were, (1) that the license was incomplete until the machinery was removed by the plaintiff; and (2) that, for this reason, any promise made by Mr. Ford would be *without consideration*. It was not contended or suggested that any promise made by him was or would be *without authority*. Objection was also taken to the introduction in evidence of the bills or vouchers for the amounts expended by plaintiffs. I think they were admissible, not as proof of the facts stated in them, but as tending to show that Ford's instructions to send him the bills were complied with. The services specified in the bills and their value were proved by extrinsic evidence. Evidence of what was said and done about the machinery by the persons employed by defendants to shore up the wall when they first entered the plaintiff's premises, were admissible as part of the *res gestæ*.

A careful review of the whole case, and a critical examination of the exceptions, has failed to disclose any error for which the judgment and order appealed from should be reversed. The evidence would have warranted a larger recovery.

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The judgment and order appealed from must, therefore, be affirmed, with costs of the appeal.

CURTIS, Ch. J., concurred.

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MARCUS WITMARK, PLAINTIFF AND RESPOND-  
ENT, v. LEOPOLD HERMAN AND SOLOMON  
HERMAN, DEFENDANTS AND APPELLANTS.

ARREST AND BAIL.

False statements made by a party in regard to the solvency and pecuniary resources of his firm, for the purpose of obtaining credit on the purchase of goods for said firm, and with the intent to cheat and defraud the party from whom the goods are purchased, when sufficiently averred in a pleading or affidavit, are sufficient to sustain an action on the case for fraud and deceit against the party making such false statements (*Stitt v. Little*, 63 *N. Y.* 427), and uncontroverted they show the debt to have been fraudulently contracted, and for the fraud thus perpetrated the partner by whom the false representations are made, if not others who profited by the transaction, can be lawfully arrested and held to bail (*Sherman v. Smith*, and cases therein cited, 42 *How. Pr.* 198).

Before SPEIR and SANFORD, JJ.

*Decided June 24 1878.*

Appeal from an order denying defendant's motion to discharge the defendant Solomon Herman from arrest, and refusing him leave to renew such motion.

The action is brought to recover \$459.30, the price and value of merchandise sold and delivered by plaintiff to defendants between February 7 and April 5,

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Statement of the Case.

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1877, on a credit of sixty days. Such sale was made and credit given, as the plaintiff alleges, in reliance upon false and fraudulent representations made by the defendant Solomon Herman as to the solvency and pecuniary resources of the defendants' firm. Upon the verified complaint and the affidavit of the plaintiff, showing the existence of a cause of action on contract, and that the liability of the defendants was fraudulently incurred, an order of arrest was made, on March 2, 1878, under which both of the defendants were arrested and held to bail. On March 21, 1878, the defendants obtained an order requiring the plaintiff, upon affidavits made by each of said defendants and by one Ralph Geist, to show cause why such order of arrest should not be vacated, and why the plaintiff should not be compelled to state separately his cause of action for each of the six sales alleged in his papers, and why the plaintiff should not be compelled to elect between his cause of action for breach of contract and tort.

On the argument, the defendants in open court duly and voluntarily waived the affidavits on their behalf upon which such order to show cause was obtained, and, in support of their motion, relied solely upon the papers upon which such order of arrest was granted.

The court refused to vacate the order of arrest as to Solomon Herman, but granted the motion as to Leopold Herman upon his stipulating not to institute any suit founded on his arrest.

Solomon Herman then moved for leave to renew the application, as to himself, upon the affidavits served with the order to show cause, or upon other and additional affidavits, and the court denied his motion. An order was thereupon entered, in which the facts as above stated are recited, and which conforms in all respects to the decision of the court.



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Opinion of the Court, by SANFORD, J.

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From that order both defendants appeal.

*Charles S. Gage*, for appellants.

*Benno Loewy*, for respondent.

BY THE COURT.—SANFORD, J.—The facts stated in the complaint and in the affidavit of the plaintiff, upon which the order of arrest was granted, are, for the purposes of the present appeal, to be taken as true. If the affidavits upon which the defendants obtained their order to show cause controverted such facts, which does not appear from the record, the waiver and withdrawal of those affidavits is tantamount to an express admission of the allegations of the complaint and of the statements contained in the plaintiff's affidavit (*Hathorn v. Hall*, 4 *Abb. Pr.* 227; *Lowell v. Martin*, 21 *How. Pr.* 238). It clearly appears from the plaintiff's affidavit, as well as from the complaint, that the goods for the value whereof a recovery is sought were sold, and that credit was given therefor to the defendants, in reliance upon false statements made by the defendant Solomon Herman in regard to the solvency and pecuniary resources of the defendants' firm, and that such statements were made for the purpose of obtaining such credit. Such statements are alleged to have been made with the intent to cheat and defraud the plaintiff, and their falsity is declared to have been known to the defendant, Solomon Herman, when he made them. These averments would be sufficient to sustain an action on the case for fraud and deceit (*Still v. Little*, 63 *N. Y.* 427), and uncontroverted, they show that the debt for which the present action is brought was fraudulently contracted. If the defendants' guilty purpose were in issue, the fact of their failure within a month after their last purchase from the plaintiff was made, with but a small stock of goods on hand, and with assets scarcely exceeding

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Opinion of the Court, by SANFORD, J.

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one-third of their liabilities, would tend strongly to induce the inference that they must have known, or at least must have had ample reason to believe, that they were hopelessly insolvent when the representations were made, on the faith of which a credit was given them. For the fraud thus perpetrated, the individual partner by whom the false representations were made, if not both, who profited by it (*Sherman v. Smith*, and cases cited, 42 *How. Pr.* 198), could lawfully be arrested and held to bail.

The refusal of the judge to permit the motion to be renewed was discretionary, and his discretion was wisely and properly exercised. There was nothing before him to excuse or explain the action of the defendants' attorney, in deliberately and unqualifiedly waiving the affidavits on which he had obtained his order, and in relying solely upon the papers upon which the order of arrest was granted. The affidavits were in his possession, and his election not to use them cannot be ascribed to inadvertence or mistake. The application to renew should have been founded upon some meritorious basis.

The order appealed from must be affirmed with costs; but, inasmuch as some satisfactory explanation or excuse may be offered for the withdrawal of the affidavits upon which the order to show cause was granted, the defendants, upon payment of the costs of the motion, and of this appeal, may apply at special term, upon proper papers, for leave to renew their application in such manner and upon such terms as shall be just.

The order appealed from contains no provision with respect to the separate statement of the several sales, alleged in the complaint. The question as to the propriety of such separate statement is not raised by this appeal.

SPEIR, J., concurred.

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Statement of the Case.

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ANDERSON FOWLER, PLAINTIFF AND APPELLANT, v. HENRIETTA BUTTERLY (SUBSTITUTED IN PLACE OF NORTH AMERICA LIFE INSURANCE CO.), DEFENDANT AND RESPONDENT.

LIFE INSURANCE POLICY.—HUSBAND AND WIFE.—MARRIED WOMAN, RIGHTS AND POWERS OF.—GIFT, COMPLETION OF.

Nicholas Butterly, the husband of the defendant, procured a policy of life insurance to be issued to him in September, 1869, by the North America Life Insurance Co., which assured his life in the sum of \$5,000, until September 6, 1882, or until his decease, in case he died before the last named date, and then said company agreed to pay the said \$5,000 to him, in case he was living at the expiration of the time, and in case of his decease before that time, it agreed to pay the said sum to his wife, the defendant. In October, 1872, both husband and wife executed an assignment of the policy to one McCormack, who subsequently assigned the same to plaintiff. In 1875, Nicholas Butterly died. The plaintiff sued the company, who paid the money into court, and procured the substitution of the defendant in its place. This appeal is from the decision of the judge below, on the following points :

1. That the policy of insurance was protected by the statute in respect of life insurance for the benefit of married women, and that, in 1872, when the defendant signed the instrument, which was in the form of an assignment, she had no right to assign the same.

2. That whatever was the nature of her rights under the policy, her execution of the purported assignment was not her act, but was the result of undue influence used upon her by her husband, which amounted to compulsion.

The following question was also raised and argued by counsel on the appeal. That the defendant had no rights or interest whatsoever in the policy at the time of the assignment, but the husband was possessed of the whole legal and beneficial property and interest in the policy and the same passed by his assignment.

On these several points the court—*Held*, the wife had the power to transfer any right or interest in the policy, that had

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Statement of the Case.

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vested in her at the time she executed the purported assignment.

If the means used by the husband deprived the defendant of mental or moral power to guide her actions for herself, the signature was not voluntary, but extorted from her.

If she was induced or persuaded to act, her signature was voluntary. If she was compelled to act, it was involuntary.

The kind and amount of force used in such a case has the same relations that it would have in a charge of robbery, as distinguished from larceny or false pretenses.

What will compel a wife to sign may depend upon her temperament, and the past relations between her and her husband. There may be little in the way of threats or action, and yet the absolute fact may be, that resistance to his will or non-compliance with it may be impossible.

If the wife testifies to her own state of mind, and swears that she was afraid of her husband, the court must rest upon that fact, if she is a credible witness.

In this case the husband was not possessed of the whole legal and beneficial property and interest in the policy. The wife had a right and interest therein created by her husband in the nature of a gift, and it thereby became her sole and separate estate, and he had not the power in law or equity to dispose of it.

Before the statute relating to and protecting the estates of married women, the husband had power to give, directly and without the intervention of trustees, personal property to his wife, so that the same became free in equity from his power of disposition of the same. By our present statute law a gift of property by a husband to his wife vests the same absolutely in the wife, and it becomes her separate property and estate to all intents and purposes.

The form of the gift is not important if it appears that there was an executed intention to give (*Stewart v. Kissam*, 2 Barb. 493).

In the present case the right or interest of the wife proceeds from the husband voluntarily, and his acts and intentions in respect to it, and the limitations and modes of control of the same prescribed by him at the time of its creation must be entirely respected and preserved by the court.

In all cases it is safest to consider that there must be a delivery of the gift, or an execution of the intention on the part of the donor, to benefit the donee without delivery. In this

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Statement of the Case.

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case the omission to deliver the policy to the wife is not conclusive against the gift, because the form of the gift was such that the husband would naturally retain the policy in his possession, to use for himself (in case he lived until the year 1881).

In cases of choses in action actual delivery is not always necessary (see the cases cited and reviewed in the opinion of the court, as applicable to the questions in this case). The original delivery of this policy was to the husband in behalf of his wife as well as in his own behalf, and upon that delivery the wife became vested with an interest in the policy which the husband could not take nor divest from her without her consent.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided August 1, 1878.*

Appeal from judgment entered on decision of judge at special term.

The original defendant deposited in court \$5,041. The case showed these facts. On September 6, 1867, Nicholas Butterly, husband of defendant Henrietta Butterly, applied in writing to the North America Life Insurance Company for insurance on his life; and to the direction to "Specify name of person or persons for whose benefit assurance is desired. If wife of person to be assured, say so,"—stated: "Nicholas Butterly. A. In case of death to Henrietta Butterly, wife, if living. B. Otherwise to Alice V. Butterly, daughter." A policy was thereupon issued. This policy was, about September 28, 1869, surrendered by Nicholas Butterly and a new policy was issued to him. The only alteration related to the manner of paying the premium. The policies contained the provision that the company "do assure the life of Nicholas Butterly, of Brooklyn, in the amount of \$5,000, until the sixth day of September, in the year 1882, or until his decease in case of his death before that time. And the said company do hereby promise and agree to and with the said assured

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Statement of the Case.

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well and truly to pay or cause to be paid, the said sum insured to the said assured, within 90 days after the termination of this assurance as aforesaid, or in case he shall die before that time, then to Henrietta Butterly, wife, if living, otherwise to Alice V. Butterly, daughter of the said assured." There was a further provision that the "company do further promise and agree, that if after due payment of the said premiums for the first two years of the assurance, default shall be made in the payment of any subsequent premiums . . . they will pay . . . as many fifteenth parts of the original amount hereby assured, as there shall have been complete annual premiums paid at the time when such default shall first be made." This clause was not to be operative unless the policy should be returned to the company within thirty days from the day of default. He paid the premiums to October 13, 1872, and on that day, executed and delivered the following assignment:

"In consideration of the sum of \$1,500 to me in hand paid by Joseph E. McCormack, the receipt whereof is hereby acknowledged, I, Nicholas Butterly, do hereby sell, assign, transfer and set over unto the said Joseph E. McCormack, the policy of insurance on my life, issued by The North America Life Insurance Company, and numbered 11,994.

"Dated, New York, October 13, 1872."

On the same date, the following paper was delivered by Nicholas Butterly to McCormack:

"In consideration of the sum of one dollar, to us in hand paid by Joseph E. McCormack, the receipt whereof is hereby acknowledged, we Henrietta (wife), and Alice V. Butterly (daughter), do hereby sell, assign, transfer and set over unto the said Joseph E. McCormack, all our right, title and interest, in the policy

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Appellant's points.

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of insurance on the life of Nicholas Butterly, issued by The North America Life Insurance Company, and numbered 11,994.

“Dated, New York, October 13, 1872.

“HENRIETTA BUTTERLY.

“ALICE V. BUTTERLY.”

Thereafter the premiums were paid by McCormack, until he assigned the policy to the plaintiff, and then the premium was paid by plaintiff, or on his account by McCormack.

As to the instrument signed by the defendant, Mrs. Butterly, the judge found as matter of fact, that “it was signed by her without any knowledge of its purpose or purport, without any consideration passed to her for so doing, and without any intention on her part to divest herself of any property or right, or of any interest in said assurance, and that her signature thereto was procured from her by the exercise, on the part of her husband, of undue influence and control, amounting to compulsion ;” and as a conclusion of law on these facts, that the instrument was inoperative and void as an assignment of the wife's interest in the policy.

The general conclusion was, that the assignment by the husband transferred only his contingent interest to receive the amount of insurance, in case he was living in 1881, and he having died in 1875, the wife was entitled to the amount insured.

*C. Van Santvoord*, attorney, and of counsel for appellant, among other things, urged :—I. The policy issued to Nicholas Butterly, as the covenantee, on his application for a consideration moving from him, with the provision in the covenant with him to pay the sum insured on his life to his wife, if she survived him, at the most vested in or conferred upon her a right of

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Appellant's points.

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action, if she survived, for the recovery of such sum, which, as a chose in action of the wife by the gift of the husband, the latter could defeat by a release or an assignment for a valuable consideration. In *Draper v. Jackson* (16 *Mass.* 476), it was held that the law required that a note and mortgage made to husband and wife should go to the wife if she survived her husband, for which the reason given is that when the husband takes a security for a debt in the joint names of himself and wife he is understood to assent and intend that she shall have some peculiar benefit from it (pp. 482, 486). It is added, it is true, that the husband may afterwards change his mind and may release the demand or take a new security for it, or bring the action in his own name, and if he recovers the money he will retain it to his own use. In 2 *Pierre Williams*, 497, the lord chancellor held that a bond given to husband and wife during coverture, on the husband's dying first, survived to the wife, though it be true that the husband may disagree to the wife's right to it, and bring the action on the bond in his own name only; but till such disagreement the right to the bond is in both the husband and wife, and shall survive. In *Sanford v. Sanford* (45 *N. Y.* 723), it is held that if one loaning money takes a promissory note therefor, payable to the order of himself and wife, this imports a gift to the wife if she survive him, and delivery of the note to her by the husband is not necessary to perfect the gift. During the husband's life such note remains subject to the husband's control, and the wife has no legal interest therein, until his decease—that is, until his decease without having exercised his right to control the disposition of the note. See, further, as to right of husband to dispose of the choses in action of the wife, by a sale for valuable consideration, the leading case in this State: *Schuyler v. Hoyle*, 5 *Johns. Ch.* 196. In 2 *Kent's Com.* 137, it is said the rule is, that



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if the husband appoints an attorney to receive the money, and he receives it, or if he mortgages the wife's choses in action, or assigns them without reservation for a valuable consideration, or if he recover the debt by a suit in his own name, or if he release the debt or novates the debt by taking a new security in his own name, in all these cases, upon his death the right of survivorship in the wife to the property ceases. The right of the husband to dispose of the interest of the wife acquired by the gift of the husband is not affected by the acts for the more effectual protection of the property of married women, act of April 7, 1848, ch. 200; April 11, 1849, ch. 375 (See section 3 of act of 1848, as amended by act of 1849. See *Towl v. Towl*, 114 *Mass.* 167).

II. The policy being the instrument by which the payment of the amount insured was secured to be paid, whether the payment should become due before or after the death of Butterly, the assignment thereof by Butterly to McCormack for a valuable consideration, without any reservation, was an effectual transfer of the interest in the sum assured, whether the same should become payable before or after the death of Butterly, discharged of any claim of the wife as survivor, which was terminated by such assignment (See *Jones v. Gibbon*, 9 *Vesey*, 411; 2 *Kent*, 137).

III. But, further, the covenant in the policy being with N. Butterly, as the assured, the legal title and interest was in him, and no suit could be brought at common law upon it except in his name or that of his executors or administrators (1 *Chitty Pl.* 3). His so taking it is evidence of an intention to retain the control of it, and without a delivery to the wife with intent to pass the title, or retaining it until his death without disposing of it, the wife could acquire no interest in it (*Hicks v. Davis*, 3 *Md. Ch.* 266; *Carpenter v. Dodge*, 20 *Vt.* 595; *Scott v. Simes*, 10 *Bosw.*

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Respondent's points.

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314; *Reed v. Reed*, 52 *N. Y.* 651. See also *Fortesque v. Barratt*, *Myl. & Keene*, 36; *Stone v. Haskett*, 12 *Gray*, 227).

IV. The assignment of the wife was effective to pass any interest which she may be supposed to have had, if any, there being nothing in any statute at that time enacted, which required any acknowledgment before any commissioner or notary; and the presumption of law being, that a party to a writing did read it, or was otherwise informed of its contents, or was willing to assent to its terms without reading it, where there is no evidence of fraud or imposition (See cases collected in *Grace v. Adams*, 100 *Mass.* 507).

V. Any interest which the defendant can be supposed to have acquired by the terms of the policy was contingent upon its continuance, by the payment of premiums for account or benefit of the original parties on days specified. And when, after the sale to McCormack, to be rid of the payment of further premiums which Butterly was under no contract or obligation to make, no provision was ever made for such payment by or on behalf of Mr. Butterly; this should be deemed an abandonment of any such interest (See *Baker v. Union Mutual Life Ins. Co.*, 43 *N. Y.* 283).

*Luke A. Lockwood*, attorney, and *Henry W. Johnson*, of counsel, for respondent, among other things, urged:—I. Upon the facts proven and found, there clearly is no error in the conclusion of law found thereon: “that the paper purporting to be an assignment of her right and interest, is inoperative and void.” If it was not her *free act* and deed, if it was not executed or delivered by her *knowingly, understandingly and intentionally*, it could not operate to deprive her of a single right, unless such facts or circumstances were shown as would create an *estoppel* against her. It was not claimed or pretended on the

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trial, nor is it suggested by any of the exceptions, that any such facts or circumstances existed ; and it is clear from the evidence that all of the essential elements of an *estoppel* are wanting in the case. The assignee dealt with the husband as the sole owner of the policy ; bargained with him for it ; paid him for it ; never saw the wife respecting it, and never paid her anything. For aught that appears from the evidence he did not require anything from her ; never examined the instrument signed by her, or made any inquiry respecting it, or did any act upon the faith of it.

Upon this state of facts it clearly cannot be claimed or pretended that the instrument can be upheld as an *estoppel* within any well-considered authority (2 *Bishop on Married Women*, §§ 484-495 ; *Tyler on Infancy and Coverture*, 726).

II. But the instrument signed by the defendant was inoperative and void for another reason. 1. The policy is a "wife's policy" within the spirit and object, if not the letter, of the legislation of this State enabling the husband to make provision by insurance for the benefit of his wife *as a widow*, as such legislation has been interpreted by the courts and by the enabling act of June 23, 1873. She did not, and could not, therefore, transfer any interest in the policy by the instrument in question (*Eadie v. Slimmon*, 26 *N. Y.* 9 ; *Barry v. Equitable*, 59 *Id.* 587 ; *Barry v. Brune*, 8 *Hun*, 400 ; *Moehring v. Mitchell*, 1 *Barb. Ch.* 264 ; *Laws of 1840*, ch. 80 ; *Laws of 1858*, ch. 187 ; *Laws of 1862*, ch. 656 ; *Laws of 1870*, ch. 277 ; *Laws of 1873*, ch. 281). 2. If the policy is not a "wife's policy" within the authorities and acts above referred to, it constituted a valid insurance in favor of the wife at common law, and she was thereby constituted the *appointee* or *beneficiary* of the fund upon her husband's death (*Baker v. Union Mutual Life Ins. Co.*, 43 *N. Y.* 287 ; *Lord v. Dall*, 12 *Mass.* 115 ; *Thompson v. Amer.*

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Tontine Life and Savings Ins. Co., 46 N. Y. 674). 3. Being a mere appointee of the fund, no interest vested in her which could be the subject of assignment during the lifetime of her husband.

III. The plaintiff's case is to be considered only in the light of the instrument executed and delivered by Butterly to McCormack. That instrument was nothing more than what it purported to be *on its face*, and that was, an assignment of the policy *as it then existed*. It had undergone no change since it was issued. By its terms the insurance money was not payable to Butterly unless he should be alive on September 6, 1882, and the policy was then in full force. If he died before that day, leaving the defendant him surviving, and the policy in full force, then the insurers expressly stipulated and agreed to pay the money to her. The precise event has happened which, by the terms of the policy, makes the money payable to her. Butterly has died, leaving the policy in full force and the defendant surviving.

The sole effect of his assignment, therefore, was to vest in the assignee the same right to receive the money that he, Butterly, would have had if it had not been executed; that is, a right to receive the money on September 6, 1882, if then living, and the policy should be then in force. As he is now dead, it follows as a necessary result, that the plaintiff can take nothing by the assignment.

BY THE COURT.—SEDGWICK, J.—The learned judge held that the policy of insurance was protected by the statutes in respect of life insurance for the benefit of married women, and that, in 1872, when the wife signed the paper, which was in form her assignment, she had no right to assign it (*Eadie v. Slimmon*, 26 N. Y. 9; *Barry v. Equitable Ins. Co.*, 59 *Id.* 587). A married woman possessed such a right, for the first

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time in 1873 (*Laws of 1873*, ch. 821). He thus impliedly held that her interest under the policy was not her separate estate, and she had no power of disposition over it as her separate estate. He further considered, that whatever the nature of her right was, her execution of the assignment was not her act, but it was the result of undue influence used upon her by her husband, which amounted to compulsion.

Undoubtedly (*Barry v. Equitable Ins. Co.*, *supra*) if the means used by her husband deprived her of mental or moral power to guide her actions, for herself, her signature was not voluntary. It was extorted from her. She had all the faculties for free action. She could not be deprived of those, but means might be used to stop their function.

The point to be scrutinized is the condition of the faculty of volition as determined by external circumstances, beyond her control. These circumstances are to be examined to ascertain their effect upon the will. Their character in other regards is immaterial. If the result was, that she was induced or persuaded to act, her signature was voluntary. If she was compelled to act, it was involuntary. The kind and amount of force used in such a case has the same relations that it would have in a charge of robbery, as distinguished from larceny or false pretenses.

What will compel the wife to sign may depend upon her temperament and the past relations between her and her husband. There may not be much to testify to, so far as words or threats go, but the absolute fact may be, that resistance to his will or non-compliance with it, was not possible. A judge must be very cautious, but in a case like the present, the wife herself is the witness to testify to her own state of mind. She swore she signed because she was afraid of her husband. The judge was bound to rest upon the fact, if she were credible. There was testimony to sup-

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port the finding of fact on this point, and it must be sustained.

The learned counsel for the appellant takes the position that the policy was not within the statutes that regulate life insurance for the benefit of married women. He argued that the statute meant to protect against creditors, the use of premiums paid from the husband's moneys in case the benefit was to go to the wife, but in the present case the policy was in fact for the benefit of the husband, as he would have the insurance money if he lived to the year 1881. The whole premium was paid *in solido* for the husband's benefit, and therefore the husband's creditors would have a right to take it.

I think this is correct, and it meets the position that the insurance could not be assigned by the wife, by reason of the policy of the statute; but it does not meet the position that her assignment was obtained by compulsion.

Therefore the judgment must be sustained, unless the husband, at the time of his assignment, was possessed of the whole legal and beneficial property and interest in the policy, and the wife had no interest or property in it. If the wife, however, had a right of action, in the nature of a gift by her husband, it became her sole and separate estate. If it was her separate estate, he had no power, in law or equity, to dispose of it. Before the statute to protect the estates of married women the husband had power in equity to give directly and without trustees personal property to his wife, so that it was free in equity from his power of disposition. By our statute, a gift by husband to wife, becomes her separate property for all purposes. The form of the gift is not important, if it appear that there was an executed intention to give (*Stewart v. Kissam*, 2 Barb. 493).

In cases like the present, the right or interest pro-

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ceeds from the husband voluntarily. His acts and intentions in respect of it are to be entirely respected, and the limitations and modes of control which he presented are to be entirely preserved.

It is said that he never parted or intended to part with his control, because the promise is wholly made to him, and the policy was kept in his own possession. The only clause which seems to give the wife an interest (viz., that which makes it payable to her, if he die before 1881), was dictated by him, and did not affect any right or interest of the company. It was not a stipulation for their benefit.

If that clause were not in the policy, the husband could by law, without leave of the company, shape an assignment that would have the same effect as the clause, and could keep any degree of control over the assignment he pleased. Therefore it is argued, that so long as the policy is not delivered to the wife, the maxim applies, viz., *Expressio eorum quæ tacite insunt nihil operatur*.

This argument was used in *Connecticut Mutual Life Insurance Co. v. Burroughs*, 34 Conn. 305.

A married woman procured an insurance on her husband's life, payable to her, her administrators and assigns, for her sole use. The policy provided that in case of the death of the wife before the death of the husband "the amount of said insurance shall be payable after her death to her children for their use, or to their guardian if under age."

Before the husband's death she had assigned the policy to the defendant. After her husband's death, the insurance money was claimed by her child. The court held that the child's interest was protected by a statute of Connecticut, and could not be assigned by the mother. The court also looked at the case irrespective of the statute, and as if the premiums had been paid by her from her separate property. The



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suggestion had been made that the provision in favor of the children was an expressed but unexecuted intention to give the sum insured to her children, which she could abandon at pleasure. The court was of the opinion that "the intention was not to give a sum of money to the children but to make a life policy in a certain event payable to them. The intention was not only expressed but executed. The contract was complete, and the money when due was payable to the children, without any further act on her part."

It cannot with certainty be said that the law will deem a voluntary provision for wife or children final and irrevocable, under different and less significant circumstances than would uphold a voluntary disposition in favor of a person with no tie of blood or marriage. A meritorious consideration is hardly more than an expression used by judges to intimate a justifiable inclination to uphold a settlement. It is safest to consider that in all cases there must be a delivery, or an execution of the intention to benefit without delivery. In the present case, so far as intention goes, the omission to deliver the policy is not conclusive, for the form was such that the husband would retain it, to use for himself, in the contingency of his living until the year 1881.

In cases of choses in action actual delivery is not always necessary. In *Scott v. Sims* (10 *Bosw.* 314; *Borst v. Spelman*, 4 *N. Y.* 288), and in *Sanford v. Sanford* (45 *N. Y.* 726), the law is applied that if a husband take a note to himself and his wife or to her alone, then in case she survive him, the action on it survives to her the wife, and the form of the security implies a design by the husband to benefit the wife. It was said that the wife had no legal interest in it during the husband's life. Judge PECKHAM said specifically, in *Sanford v. Sanford*, that a delivery to the wife was unnecessary to perfect the gift. These cases are



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like the present, excepting that in them the husband retained but did not exercise a power and right of disposition, during his life, and in this the husband in his life did all in his power to convey his whole right and interest in the policy, and also that in them the promise was made to the wife solely or jointly, directly, and in this, the promise is made solely to the husband.

“It is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person he being neither privy to the contract nor to the consideration (*Simson v. Brown*, 68 *N. Y.* 362; *Garnsey v. Rogers*, 47 *N. Y.* 233); yet the form and nature of the contract of insurance and the point at which the wife could only reap the benefit of the provision in her favor,—that is, after his death,—show clearly that it was the husband’s intent that she should have a right of action.”

The mere form of this promise might not divest the husband of all power over the wife’s interest which he intended to bestow on her, but the contemporaneous acts, voluntarily and designedly adopted by him, were such as to make all else that was necessary to an executed transfer to her a matter of form. If the owner of personal property make an explicit declaration that he holds it in trust for another, it is an executed trust, although there is no doubt that no transfer and re-transfer was made. The reason of this must be, that, as owner, he has the power to furnish conclusive evidence that the result or effect of a transferring by him and taking a re-transfer to him in trust has occurred.

The rest is but a form which he, as owner in his own right, has the power to dispense with. Even in delivery of chattels as a gift, the form of relinquishing possession by the donor and the taking of it by the donee immediately, may be dispensed with, in the

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instance of the chattels being within the power of the two parties, and both act as if delivery and acceptance had taken place.

In this case, outside of the effect of the form of the policy, the husband declared in writing to the company that it was for the benefit of his wife, &c., and of himself, and upon that the company made the special promise, so far as it was for the benefit of the wife, to the husband acting in her behalf,—whether as her agent or trustee is immaterial. All that might have been done by him, in the shape of an assignment to her, and notice of that by him on her behalf to the company, would not have necessarily involved any action by her personally. The legal result would have been what he effected without the unnecessary form.

I am, therefore, of the opinion that under the circumstances the original delivery of the policy was to the husband, in her behalf and as well as his, and that upon that delivery she became vested with an interest which the husband could not divest without her consent.

The judgment should be affirmed with costs.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

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GUSTAV E. SPARMANN, BY GUARDIAN, PLAINTIFF, v. JOHN KEIM, DEFENDANT.

I. FRAUD.

1. *False representations.*

(a) What does not constitute in the law.

1. BUSINESS. A representation that a certain business would yield large profits, does not.

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Statement of the Case.

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II. *Complaint.—Construction of, on appeal.*

## 1. TWO CAUSES OF ACTION, WHEN NOT REGARDED AS CONTAINED IN.

(a) Where there are averments, which, taken by themselves, would *constitute a cause of action based on contract*, but not stated as constituting a separate cause of action, but on the contrary so intimately interwoven with other averments as to show that the whole *theory of the action was based on tort*, to wit, fraudulent representations; and upon a motion being made on the trial after all the evidence was in, for a dismissal of the complaint, on the ground that an action could not be sustained on the false representation stated in the complaint, the *plaintiff made no claim that the evidence sustained any part of the complaint as showing an action on contract*; and the court granted the motion, to which plaintiff excepted; and ordered the exceptions to be heard in the first instance at the general term,

HELD,

on hearing the exceptions, that the complaint must be regarded as containing but a single cause of action, viz.: one in tort, and that plaintiff could not sustain his exceptions on the ground that the evidence sustained those averments in the complaint, which, if taken separately, might be deemed to state a cause of action in contract,

Before SEDGWICK and SANFORD, JJ.

*Decided November 4, 1878.*

Exceptions of plaintiff, heard at general term in first instance, upon dismissal of complaint.

The complaint alleged as follows:

“ I. That the plaintiff is an infant under the age of twenty-one years.

“ II. That on the fifth day of October, A. D. 1874, at said city of New York, upon application duly made on his behalf, the said Chas. J. Nehrbas was, by an order of this court, duly appointed the guardian of the plaintiff for the purposes of this action.

“ III. That on or about the first day of July, A. D. 1874, the said defendant, by means of false representations, obtained from said plaintiff the sum of one thou-

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sand dollars, to be invested in a certain artistic decorating business which said defendant falsely represented would yield large profits, but on the contrary said business is and has been ever since said first day of July, A. D. 1874, constantly losing money, and furthermore said defendant is appropriating whatever profits may be and are realized, to his own use and benefit, to the great danger and injury of the plaintiff.

“IV. That relying upon such representations on the part of the defendant, the plaintiff did, on or about said first day of July, 1874, pay over to said defendant, at his instance and request, said sum of one thousand dollars for the purposes of said business.

“V. Plaintiff also shows that between about June 11, 1874, and about July 1, 1874, said plaintiff at the request of the defendant lent and advanced unto such defendant, and also to and for his use by payments to other parties at his instance, divers sums of money, viz., altogether about four hundred and one dollars and ninety-five cents, upon condition that the same should be repaid upon demand, but the defendant has wholly failed to repay the same though payment thereof has been duly demanded; and that said amount of money, so lent and advanced and paid out, as aforesaid, was thereafter, upon the formation of such partnership, allowed by the defendant as part of such one thousand dollars contributed as herein above mentioned, and constitutes a portion of the same.

“VI. That the plaintiff upon ascertaining the falsity of the representations made by defendant as aforesaid, and before the commencement of this action, has demanded a return to him, plaintiff, of the aforesaid one thousand dollars by the defendant, who however utterly refused so to do, and still so refuses.”

Evidence was taken, which tended to show that plaintiff had been induced to place money in a certain business by representations of the defendant that the

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Plaintiff's points.

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business was a good paying business, and that they would make lots of money in it, and also that before the plaintiff definitely agreed to become partner with the defendant in the business, he had lent to the defendant various sums of money, or had paid it to third parties; and that when the agreement to go into the business was made it was agreed that the former loans and advances should be deemed as part of the \$1,000, which the plaintiff was to place in the business. There was a third person interested in the business.

The court dismissed the complaint on the ground that the representations complained of, even admitting them to be false, were not false representations known to the law, but the expression of opinion. Plaintiff excepted, and the exceptions were ordered to be heard in the first instance at general term.

*Nehrbas & Pitshke*, attorneys, and of counsel for plaintiff, urged:—I. Where the infant party is manifestly entitled to something, the court should not suffer him to be deprived of existing rights, by the guardian's mode of pleading, or other neglect, if any (*Stephens v. Van Buren*, 1 *Paige*, 479, 480; *Howell v. Mills*, 53 *N. Y.* 322). The justice should, therefore, have considered the "case made out by the evidence,"—which was sufficient, in law. So, a judgment was vacated to protect infant's rights—notwithstanding the pleading of his guardian *ad lit.* (*Curtis v. Ballagh*, 4 *Edw. Ch.* 635).

II. But the complaint is correct,—*i. e.*, it is on contract, and not at all *ex delicto*. The first count (subd. V. of complaint) is, of course, *ex contractu*; and as to the other count (*i. e.*, the rest of complaint), the same simply avers that defendant stated to the plaintiff that by his coming in as partner with capital, &c., that certain business spoken of would yield large profits, &c., and thereby plaintiff was induced so to enter defend-

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Plaintiff's points.

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ant's then business with money &c.,—which statements uttered by defendant were, as the thing turned out, false (*i. e.*, untrue). Having been thus led to fructify the defendant's then business, plaintiff sets forth the whole case, and claims his "infant's privilege" to get back his money. 1. The justice could not dismiss this case as one *ex delicto*—when the complaint was all *ex contractu*. 2. But our complaint, apart from theory, is *ex contractu* by express authority of *Byxbie v. Wood*, 24 *N. Y.* 607, 612. There, the complaint averred that plaintiff's assignor and defendant being about to go in a joint enterprise, by defendant's "false and fraudulent representations" as to the value, &c., of the defendant's then ship to be used for the enterprise, the plaintiff's assignor was induced to pay certain moneys towards a half interest in said ship, which moneys plaintiff reclaims from defendant. On the trial, however, fraud was not proved. *Held*, plaintiff could recover as for money had and received. "The action, though no fraud is proven, is sustainable as merely for money,—which the law implies a promise to repay. The action sounds in contract, and the words charging a wrong should be disregarded" (*Veeder v. Cooley*, 2 *Hun.*, 74).

III. The first count (*i. e.*, subd. V. of complaint), is a pure money demand—*i. e.*, direct loans to and advances for defendant. The plaintiff and defendant were in law strangers to one another, up to July 1, 1874, the date they established their copartnership. And all transactions prior to that date are simple loans and advances to defendant and for his use,—to which the law adds a promise to repay. Hence, as regards this first count (\$401.95), plaintiff was also entitled to the jury's verdict, for that (*Fey v. Smith*, 3 *Daly*, 389). Defendant cannot urge the "agreement" as changing the status of this \$401.95 from "loans and advances"

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Opinion of the Court, by SEDGWICK, J.

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to "partnership funds;" plaintiff being an infant who herein repudiates that agreement.

IV. Second count (\$400.31) is, to recover back (because of plaintiff's infancy) money passed under the agreement signed by plaintiff and defendant,—for he (defendant) being the other party to the contract, is responsible to the infant for what passed from infant under it. An adult cannot draw in the infant to experiment on such infant's money in changing and enlarging the adult's business without liability.

*Geo. S. Sedgwick*, attorney, and with *Leonard C. Curtis*, of counsel, for defendant, urged:—I. This is a case of failure of proof. The gravamen of the cause of action averred in the complaint is false representations, and no false representations have been proved. In such a case, even if the evidence should disclose a good cause of action, the complaint must be dismissed because its essential allegations have not been proven. A judgment can be rendered only *secundum allegata et probata* (*Gaspar v. Adams*, 28 *Barb.* 441; *Kelsey v. Western*, 2 *N. Y.* 506).

II. The statement made by the defendant that the business would pay largely, was a mere expression of opinion, and was not a false representation.

BY THE COURT.—SEDGWICK, J.—It seems to me clear that, so far as the complaint shows, the plaintiff placed his right to a recovery from the defendant solely on the ground that there had been false representations made by defendant to induce him to invest money in the business. Admitting his right to proceed for money had and received upon the avoidance of any contract connected with the transaction that the plaintiff made while an infant, yet he did not elect to bring his action on that state of facts, but upon the fraud. The plaintiff pleads that on or about July 1,

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Opinion of the Court, by SEDGWICK, J.

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he was, by the alleged false representations, induced to pay over to the defendant "said sum of \$1,000 for the purposes of said business." The plaintiff then proceeds to state that about June 11 and about July 1, the plaintiff advanced certain moneys, upon condition that the sum should be repaid upon demand, but the defendant has wholly failed to repay the same, though payment thereof has been duly demanded, and that said amount of money "was thereafter, upon the formation of such partnership, allowed by the defendant as part of such \$1,000, contributed as hereinabove mentioned, and constitutes a portion of the same."

This part of the complaint is not made to constitute a second cause of action, as showing the right of the plaintiff to avoid, on the ground of infancy, the express contract, and to proceed for money had and received; for in addition to the terms of this part, the complaint proceeds "that the plaintiff upon ascertaining the falsity of the representations made by defendant as aforesaid, and upon the commencement of this action, has demanded a return to him, plaintiff, of the aforesaid \$1,000 by the defendant," who refuses, &c. If the complaint had disclosed an intention to make this a second cause of action, it would have been demurrable as joining a cause of action on contract with one for tort, although the objection would be waived if not taken before trial.

After the whole evidence was in, the motion was made to dismiss on the ground that an action for obtaining money by false representations, as stated in the complaint (the words of the objection were "complained of") would not lie, as they were only the expression of an opinion, and not the statement of a fact. There was no claim that the evidence sustained any part of the complaint as showing an action on contract for money had and received. If there had been such a claim, there would have been a statement of it, and the



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court would have acted on it in an appropriate manner. No doubt the matter was tacitly considered as the complaint left it, that the plaintiff was willing to have that part of his claim, as affected by his subsequent agreement that the money first advanced should be deemed part of the \$1,000 which he only claimed in consequence of the alleged false representations. It would seem that until after the plaintiff had made all the advances, he was ignorant that his infancy affected the rights of the parties, and there is no evidence that the defendant knew of the infancy until action was brought. There was no error in the ruling made by the court as to the false representations, and from the complaint and the whole case I am of opinion that no other claim was made.

Exceptions overruled, and judgment ordered for defendant, on the dismissal of the complaint with costs.

SANFORD, J., concurred.

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WILLIAM A. HAVEMEYER, AND ANOTHER, ADMINISTRATORS, &C., PLAINTIFFS AND RESPONDENTS, v. JOHN C. HAVEMEYER, AND ANOTHER, DEFENDANTS AND APPELLANTS.

I. Costs.

1. *Order allowing amendment of pleading.*

(a) Phrase in "ON PAYMENT OF COSTS OF THE ACTION TO THE PRESENT TIME," construction of.

1. It means such costs as would go to the party against whom the amendment is allowed, in case there had been a termination, favorable to him, at the date of the order

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granting leave to amend. *Such costs must be taxed, and if improper items are allowed the remedy is by appeal from the taxation.*

II. APPEAL.

1. *Conditions on which leave to amend pleading is granted. Appealability of.*

(a) An appeal will *not* lie therefrom. The whole order should be appealed from.

Before SEDGWICK and SANFORD, JJ.

*Decided November 4, 1878.*

Appeal from order.

*Nelson J. Waterbury*, for appellants.

*John E. Parsons*, for respondents.

BY THE COURT.—SEDGWICK, J.—The court below granted an order that the defendants have leave to serve an amended answer “upon payment by the defendants to the plaintiffs of the costs of the action to the present time.” The appeal is from so much of the order as imposes the condition of the payment of the costs of a trial already had, and of an appeal to the general term, which reversed the verdict in favor of plaintiff and directed that the defendants should have costs of the appeal to abide the event. This assumes that the matters objected to were implied in the phrase of the order “costs of the action to the present time.” The better construction is, however, such costs of the trial as would go to the plaintiff in case there had been a termination favorable to him at the time of the order giving leave to amend. In such case, the only question that could arise, would be upon an appeal from taxation which gave more costs to the plaintiff than he would be entitled to if he had recovered. For there can be no question that upon an application to substantially change a defense, the court has the power to

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impose all the costs that a plaintiff would be entitled to have in the action.

But be this so or not, an appeal will not lie from a condition merely of allowing service of an amended answer. In such case, the opposite party would be bound by the part of the order not appealed from, and is not in a position to urge that if it be without the powers of the court to impose the conditions, then leave should not be given to serve an amended answer. Yet the whole importance of the condition is, its relation to the power to be granted. There would be no error prejudicial to the defendant, if on all the facts, such a condition was imposed in a case where leave to serve the amended answer should have been absolutely denied. And any court that imposes the condition or changes one already imposed, should have the power to refuse leave (*Tribune Association v. Smith*, 40 *N. Y. Superior Ct.* 81). Therefore the question raised should have been upon an appeal from the whole order, so that there might be, here or below, a proper order made.

Order appealed from affirmed with \$10 costs to respondent.

SANFORD, J., concurred.

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THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK, PLAINTIFF AND RESPONDENT, v.  
THOMAS A. DAVIES, IMPLEADED WITH OTHERS,  
DEFENDANT AND APPELLANT.

I. PRINCIPAL.

1. *Changing the relation to that of surety.*

(a) MORTGAGE ASSUMED BY GRANTEE OF MORTGAGOR.

1. *Effect of.*

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1st. **AS TO THE MORTGAGOR.**—The land becomes the primary fund for the payment of the mortgage debt, and the mortgagor stands thereafter in the attitude of surety only.

2nd. **AS TO THE MORTGAGEE.**—After notice of assumption by the grantee, he is bound in his dealings with the grantee and others, in regard to the mortgage debt, to do nothing to the injury of the mortgagor as surety.

3rd. **RIGHTS RESULTING.**

(1) *Pursuit of land and grantee.*—The mortgagor had a right to demand that the mortgagee proceed without delay, after his right of action has accrued, to collect the mortgage debt out of the land and grantee, and if he neglects so to do after *full and explicit* request, and collection therefrom becomes thereby either wholly impossible or only partially impaired, then the mortgagor is either wholly, or *pro tanto*, as the case may be, discharged.

(2) *Extension of time.*—If the mortgagee extends the time of payment to the grantee, the mortgagor will be discharged.

(3) *Conveyance by such grantee of the mortgage to a subsequent grantee who also assumes the mortgage, effect of.*

(a) Does not impair the above stated rights of the mortgagor. It gives him the additional advantage of the subsequent assumption.

## II. SURETY.

1. *Request to creditor to pursue principal, requisites of.*

a. Where it is a corporation creditor the request **MUST BE MADE TO SOME OFFICER OR AGENT** who is authorized to act in the premises.

1. *An assistant to the solicitor* of its law department, which department examined vouchers, the surrender of death claims, and had the supervision of all litigated business and general direction of it, but had no right to order the foreclosure of a mortgage, which right was vested in its president and finance committee, *is not such officer or agent.*

2. If such assistant, however, could be regarded as a proper officer or agent to receive an unqualified request to foreclose a mortgage, *yet he is not a proper officer or agent to receive a conditional request* which imposes on the corporation the duty of keeping itself advised as to when the conditions occur upon which the request is to become operative.

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(a) *Such a request is not the full and explicit one required.*

2. *Extending time of payment so as to discharge surety.*

(a) WHAT IS NOT.—A mere forbearance to collect, or a naked promise to forbear, is not.

1. The mere *abandonment of foreclosure proceedings* upon payment, by a subsequent incumbrancer, of the costs and interest then due, and the receipt from such incumbrancer of interest subsequently falling due, there being no agreement to extend the day of payment of the mortgage, will not discharge one who stands in the position of surety for the mortgage debt, although he be the mortgagor.

III. CORPORATION CREDITOR.

1. *Surety's demand on*, to proceed against principal debtor.

(a) Requisites of.

1. *See SURETY, supra.*

Before SEDGWICK, VAN VORST and SPEIR, JJ.

*Decided November 4, 1878.*

The defendant Davies made a mortgage to the plaintiff, in 1869, to secure the payment of \$44,000 on the first of June, 1870, with semi-annual interest.

The mortgage covered lots in the City of New York, owned by Davies.

The mortgagor, subsequently to the execution of the mortgage, and during the same month in which it was made, conveyed the mortgaged premises to the defendant Cudlip. By the terms of the conveyance to him, Cudlip assumed the payment of the mortgage.

The plaintiff was advised by Davies of his conveyance to Cudlip, and of his assumption of the mortgage. Cudlip, on July 15, 1871, conveyed the premises to John Adriance, subject to the mortgage, which he agreed to pay. Adriance died in November, 1874, but previous to his death, he conveyed the premises to Nathaniel Jarvis, Jr., and others, in trust for certain

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Statement of the Case.

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purposes. The mortgage being unpaid, this action was commenced in April, 1876, for its foreclosure. The complaint demands judgment against the defendant Davies personally for any deficiency which might arise on the sale of the mortgaged premises. The defendant Davies, by his answer, avers that the plaintiff, without his knowledge or consent, several times extended the payment of the bond accompanying the mortgage, and bound itself not to foreclose the same for a specified time, and that, by reason of such extensions, he is released from all liability on account of the mortgage. He claims also to be released by the neglect of the plaintiff to foreclose the mortgage, he having, as he claims, called upon the plaintiff in December, 1874, to ascertain whether there were any taxes and assessments unpaid upon the premises, with the object of having the mortgage foreclosed if such taxes and assessments were in arrear, and was there, as he claims, informed by the agent of the plaintiff, that there were no unpaid taxes and assessments. He alleges that the company well knew, at the time of his application for information as to taxes and assessments, that his object was to procure the immediate foreclosure of the mortgage, in case any taxes and assessments were remaining unpaid, and protect himself from any depreciation in the value of the lands.

He claims that at the time he was so advised that there were no taxes or assessments unpaid, there was in fact a large amount of taxes and assessments outstanding unpaid, and that the plaintiff well knew at the time that such taxes and assessments were liens upon the premises. Defendant further in his answer urges, that up to and within a reasonable time after July, 1875, the mortgaged premises were worth, and could have been sold for, more than enough to have paid the mortgage, and all other claims against, and liens upon, the premises.

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Appellants' points.

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The action was tried at special term, and a judgment of foreclosure was rendered, the defendant Davies being adjudged to pay any deficiency remaining after the application of the proceeds of the sale, according to the directions of the decree.

The deficiency amounts to \$22,896.63. The defendant Davies appeals from so much of the judgment as holds him for the deficiency, and also from the decree itself.

*Edmund Coffin, Jr.*, attorney, and of counsel for appellant, urged:—I. After the conveyances set forth in the complaint, the relation of the several parties became settled in equity; the land became the primary fund for payment of the debt, and Adriance the principal debtor; Cudlip surety to Adriance; and the land and Davies surety to all; while the plaintiff stood, so far as the collateral was concerned, as trustee holding the mortgaged lands for the benefit of Cudlip and Davies (*Calvo v. Davies*, 8 *Hun*, 222; *Vrooman v. Turner*, *Id.* 78; *Ely v. McNight*, 30 *How. Pr.* 97; *Russell v. Pistor*, 7 *N. Y.* 171; *Bently v. Vanderheyden*, 35 *Id.* 677; *Garnsey v. Rogers*, 47 *Id.* 242; *Remsen v. Beekman*, 25 *Id.* 552; *Morss v. Gleason*, 64 *Id.* 204; *Barnes v. Mott*, *Id.* 397; *Colgrove v. Tallman*, 67 *Id.* 95). As soon as knowledge of these transfers was brought to the plaintiffs, the same liabilities and responsibilities were thrown upon them as though the relationship to the transaction arose from the original contract made by and with their consent.

II. The interview and conversation between the defendant and William G. Davies in 1874 constituted a sufficient request to collect this mortgage. The request was conditional, but made so only because of the false information given to the defendant. William G. Davies was the proper agent of the corporation plaintiff in the matter, and the company is bound by his act, whether right or wrong (*Booth v. Farmers' & Mechan-*

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Appellants' points.

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ics' Nat. Bk., 50 *N. Y.* 396 ; Leslie v. Knickerbocker Life Ins. Co., 63 *Id.* 27, 34). A corporation can act in no other way than through its agents and employees. The former position and active duty of Mr. William G. Davies made him the most proper agent in the employ of the company for this particular business. He had been in charge of the bond and mortgage department, and therefore, knew best what information could be procured from the books of the department. He was their assistant solicitor in the law department, charged with the duty of keeping the clerical run of non-payment of taxes, so that action in directing foreclosure on account of such non-payment could be taken. But when the assistant solicitor of the company assumed, by referring to the books, to be able to find the information there, when the fact inquired for was made a basis of dealing with the company, a complete *estoppel in pais* arises against the company, so far as that transaction is concerned (*Wickersham v. Lee, Alb. L. J.*, March 24, 1877, p. 234; Leslie v. Knickerbocker Life Ins. Co., *supra*). But leaving aside all this, the defendant contends that a conditional request by a surety that the creditor collect, is as ample for his protection, so soon as the condition is fulfilled, as an unconditional one. Admitting that the company was under no equitable obligation to protect the defendant by an immediate foreclosure when he made his request, because of this condition, the obligation surely did arise in March, 1875, when the fact of the existence of taxes and assessments was brought to their attention. It was Mr. Harding's specific instruction to insist on prepayment of taxes and assessments, as a condition precedent to discontinuance of foreclosure proceedings. "It is to be inferred that this would not have been departed from by him as a subordinate, unless by affirmative and particular direction from superiors, and for some particular reason and with a definite pur-



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pose" (Leslie v. Knickerbocker Life Ins. Co., *supra*). Mr. Harding testifies himself, that he did not forget his instructions, but made inquiry under them, and received special instructions to waive the general rule. For this instruction he must have gone to the law department, and either to Mr. William G. Davies himself or to his immediate superior, Judge Palmer. This brings the knowledge that the contingency mentioned by the defendant had arisen, not only to the company, but with moral certainty to the very officer of the company to whom defendant had applied. Then, with this knowledge, and after this expression of his desire on the part of the defendant, this company not only neglects to sue for defendant's protection, but overrides its own general instructions, for the indulgence of a stranger, at the defendant's expense. The proof is clear that the premises were at this time abundant in value to have paid the bond and all the tax and assessment liens. It is contrary to all justice and equity that the plaintiffs now, after this depreciation in value has occurred, may still hold the defendant for a deficiency arising solely from this late depreciation (Johnson v. Corbett, 11 Paige, 265 ; 1 Story Eq. §§ 325, 326).

III. The transaction between the company and Mr. Sage constituted an agreement not to foreclose the mortgage in suit for an appreciable period of time, and was founded on a valid and binding consideration. There was a total of \$3,217.50 paid by Mr. Sage to the plaintiffs or for their use, for which they had against him no possible claim in law or morals, unless it was in consideration for an agreement to delay foreclosure proceedings. That there was an agreement on the part of the company is abundantly proved. The plaintiffs sent the mortgage to their attorneys to be foreclosed. Mr. Sage wanted a delay in these proceedings. He went to the company about it and to the company's

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attorneys, having some conversation, as the result of which he paid his money, and the mortgage was returned to the company not foreclosed, and, with their consent, proceedings stayed for a year. In Mr. Sage's language he "paid the money for the purpose of getting time." If the company, on March 13, 1875, had gone right on with their foreclosure, to which Sage as second mortgagee was a necessary party, would not this payment under these circumstances have been a good defense and have justified an answer on his part? A parol agreement to extend time of payment of a sealed instrument is valid (*Burt v. Saxton*, 1 *Hun*, 551, and cases cited). This is applied directly to a case of mortgage foreclosure, and a parol agreement for time for a money consideration paid by a person other than the bondsman, but who was a necessary party defendant, is upheld as a good defense to an action of foreclosure (*Dodge v. Crandall*, 30 *N. Y.* 294; *Hubbard v. Gurney*, 64 *Id.* 457). The agreement may be implied and not express, and will discharge the surety (*Beard v. Root*, 4 *Hun*, 356; 41 *Super. Ct.* 235; *Ducker v. Rapp*, 67 *N. Y.* 464; *Place v. McIlvain*, 38 *Id.* 96). It is not necessary that a definite day be set to which time is extended (*Brooks v. Wright*, 13 *Allen [Mass.]* 72). But even if a definite time were necessary, we have it here, for Mr. Sage wanted time until his counsel could perfect certain proceedings then instituted. "*Id certum est, quod certum reddere potest.*"

IV. The action of the company in regard to this mortgage, from the time of its maturity in June, 1870, has been so utterly in disregard of the bond of Davies that it is evident that they had given up all claim against him long before commencement of this action; and the company has been so entirely indifferent to his rights and interests that they must, in equity, be decreed to have waived all claim of a personal nature. Adding

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this to the fact of the great delay in this action, the defendant claims that the case comes under the equities suggested in *Black River Bank v. Page*, 44 *N. Y.* 453; *Barhydt v. Ellis*, 45 *Id.* 107, and cases cited; *North Am. Fire Ins. Co. v. Mowatt*, 2 *Sandf. Ch.* 108 (marginal).

*Turner Lee & McClure*, attorneys, and *Herbert B. Turner*, of counsel, for respondent, urged:—I. When Davies conveyed the mortgaged premises to Cudlip, and Cudlip accepted the deed, in which it was recited that he, Cudlip, assumed and agreed to pay off the mortgage in question as part of the consideration of the conveyance, the relation of principal and surety was created between them. Davies became the surety and Cudlip the primary debtor, as far as their relations to each other were concerned; and, if Davies had been called upon to pay the amount due on his bond, he might have looked to Cudlip to indemnify him (*Blyer v. Munholland*, 2 *Sandf. Ch.* 478).

II. But the above proposition simply states the relations of Davies and Cudlip to each other. As far as their relations to the plaintiff are concerned, they remained and are equally bound. Davies is bound, being the original debtor. The plaintiff might have relinquished its lien on the real estate and sued him on his bond. It preferred to pursue the ordinary course—foreclose the mortgage, sell the land, and enter a judgment for the deficiency against him. It was not bound to enter such judgment against him or any other party. Cudlip, by accepting the deed, containing an agreement on his part to pay the mortgage, became liable to the plaintiff to do so. The mortgagee is entitled to claim the benefit of this promise made to its original debtor, by virtue of the doctrine of subrogation in equity, by which a creditor is entitled to all collateral securities which a debtor has obtained, to enforce the

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primary obligation (*Trotter v. Hughes*, 12 *N. Y.* 78 ; *Rawson v. Copeland*, 2 *Sandf. Ch.* 257). The agreement between Cudlip and Davies, by which the former assumed to pay Davies' debt to the plaintiff, is a personal contract made between them for the benefit of the plaintiff ; and the plaintiff might have maintained a personal action against Cudlip without foreclosing the mortgage, or joining Davies as defendant. This is on the principle that where a person makes a contract with another for the benefit of a third party, being himself bound, the third party may enforce its performance (*Burr v. Beers*, 24 *N. Y.* 178 ; *Lawrence v. Fox*, 20 *Id.* 268).

III. A surety will not be discharged unless, 1. The creditor is guilty of an act of omission, notwithstanding the *request* of the surety, and the surety sustains damage in consequence ; or, 2 The creditor makes some agreement without the consent of the surety, which changes the terms of the original contract. (1) The defendant Davies, in order to claim relief from his obligation in consequence of the neglect or delay of the plaintiff in foreclosing the mortgage, must show a *full and explicit notice* or *request* to the plaintiff to proceed, without delay ; and improper neglect, on the plaintiff's part to do so ; and that thereby the recovery of the debt has been rendered impossible (*Valentine v. Farrington*, 2 *Edw.* 53 ; *Warner v. Beardsley*, 8 *Wend.* 194 ; *Hoffman v. Hurlburt*, 13 *Id.* 377). Or he may show that the plaintiff's means of recovery have been partially impaired only, in which case his obligation is impaired only to the extent of the loss (*Barhydt v. Ellis*, 45 *N. Y.* 107). The rule which places it in the power of a surety to compel the creditor to collect the debt, by demanding that it be done, is now too firmly settled in this State to be questioned. But the history of the law in this respect shows that the rule should be restricted within close bounds, for it was

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Respondent's points.

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adopted against the opinion of some eminent judicial minds, and is not adopted to any extent in other States. The more general rule is that the surety must himself take measures, by bill in equity or otherwise, to free himself from his obligation. The history of the law in this State, on this subject, can be gleaned from the cases: *Pain v. Packard* (13 *Johns.* 174); *King v. Baldwin* (2 *Johns. Ch.* 554; S. C., 17 *Johns.* 384); *Herrick v. Borst* (4 *Hill*, 650). This doctrine of the New York courts has been expressly repudiated in other States. In Massachusetts, in the case of *Fryer v. Jennings* (4 *Pick.* 382). In Maine, in the cases of *Leavitt v. Savage* (16 *Me.* 72); *Freeman's Bank v. Rollins* (13 *Id.* 202); *Paige v. Webster* (15 *Id.* 249); see also, *Barker v. Marshall* (16 *Vt.* 522); *Ward v. Vass* (7 *Leigh*, 135); *Shaw v. McFarlane* (1 *Ired.* 216); *Johnson v. Planters' Bank* (4 *S. & M.* 165). We thus see, that even under the most lenient and indulgent view of the matter which the courts have ever taken, the surety must explicitly and formally *request* the creditor to sue before he can be discharged, and that this rule of law is confined to this State, and was introduced here with the admission that it was a "novel and alarming doctrine," and in opposition to the expressed opinion of some of our greatest judges. As matter of fact, Davies made no such request. He was content to let the matter remain as it was, so long as he was not disturbed. He alleges a request in his answer, but has wholly failed to prove it. (2.) The defendant Davies alleges in his answer, that the plaintiff extended the time for the payment of the mortgage. No evidence of any such extension was even offered at the trial. To substantiate such a defense, the defendant must show that the plaintiff voluntarily and without his consent placed itself in such a position that it could not foreclose. (a.) To support any such extension there must exist some new consideration not contemplated in the original obliga-

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Opinion of the Court, by VAN VORST, J.

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tion. No mere payment made on account of the mortgage, can, under any circumstances, constitute any such consideration (*Pabodie v. King*, 12 *Johns.* 422; *Hall v. Constant*, 2 *Hall*, 205; *Draper v. Romeyn*, 18 *Barb.* 166; *McLemore v. Powell*, 13 *Wheat.* 554; *Oxford Bank v. Lewis*, 18 *Pick.* 458; *Blackstone Bank v. Hill*, 10 *Id.* 128; *Freeman's Bank v. Rollins*, 13 *Shepley*, 203; *Central Bank v. Willard*, 17 *Pick.* 150). It clearly follows from these cases, and from the settled law on the subject, that the vital element of any continuance of a debt which will discharge a surety must be its postponement for some specified time within which no payment can be made or received, and in the absence of this element, an agreement to defer, which is not binding, and a postponement in accordance therewith, or partial agreement, or the payment of interest in advance, or even the concurrence of these, will not discharge the surety. *A fortiori* there is no extension in the present case, in which not even a single one of these circumstances relied on as a valid defense in the cases above cited, occurs. (b.) Mere indulgence granted by a creditor to the principal debtor, however long continued, and whatever the consequences, will not operate to discharge the surety (*Schroeppell v. Shaw*, 34 *N. Y.* 446; *Thompson v. Hall*, 45 *Barb.* 212; *Pollock v. Hoag*, 4 *E. D. Smith*, 473; *Dorlin v. Christie*, 39 *Barb.* 610; *Albany Dutch Church v. Vedder*, 14 *Wend.* 166; *Hunt v. Bridgam*, 2 *Pick.* 581; 2 *Pars. on Contr.* 24, and note, where the cases are collated; *People v. Jansen*, 7 *Johns.* 336; *Wright v. Simpson*, 714, 734; *Trent Navigation Co. v. Harley*, 10 *East*, 34; *Dawson v. Lawes*, 23 *E. L. & E.* 374; *Hunt v. U. S.*, 2 *Gall.* 32, 34; *Oxford Bank v. Lewis*, 8 *Pick.* 458; *Remsen v. Beekman*, 25 *N. Y.* 552, 557; *Sprague v. Bank of Mt. Pleasant*, 10 *Pet.* 257).

BY THE COURT.—VAN VORST, J.—The conveyance

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of the land by the defendant Davies to Cudlip, and the agreement by the latter to assume and pay the mortgage, created the relation of principal and surety between them. The effect of this transaction was, in equity, to make the land the primary fund for the payment of the mortgage debt, and to place Davies in the attitude of surety only thereafter (*Johnson v. Zink*, 51 *N. Y.* 333 ; *Jumel v. Jumel*, 7 *Paige*, 594).

The subsequent conveyance from Cudlip to Adriance, although the latter also assumed the payment of the mortgage, did not affect Davies' relation as surety. It gave him the additional advantage of the agreement of Adriance. This being the relation between Davies and the grantees of the premises, of which plaintiff had notice, although Davies still remained liable on the bond accompanying the mortgage, yet the plaintiff was bound in its dealings with the grantees and others, in regard to the mortgage debt, to do nothing to the injury of Davies as surety.

A surety has a right to request the creditor to proceed without delay in the collection of the debt, and if the creditor, notwithstanding such request, neglects to proceed, and the recovery of the debt thereafter has become by such delay impossible, the surety would be discharged, or should it appear that the creditor's means of recovery have been, by delay after such request, only partially impaired, then his obligation against the surety is impaired to the extent of the loss only (*Paine v. Packard*, 13 *Johns.* 174 ; *King v. Baldwin*, 2 *Johns. Ch.* 554 ; S. C., 17 *Johns.* 384 ; *Warren v. Beardsley*, 8 *Wend.* 194 ; *Herrick v. Borst*, 4 *Hill*, 650 ; *Colgrove v. Tallman*, 67 *N. Y.* 95). The reason for this conclusion being that the creditor is under an "equitable obligation" to obtain payment from the principal debtor, and the surety can by a "full and explicit request" compel the creditor to



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Opinion of the Court, by VAN VORST, J.

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proceed to recover the debt, and his refusal to do so will exonerate the surety (King v. Baldwin, *supra*).

The learned judge before whom the trial was had was requested by the defendant's counsel to find in substance as facts, that in November or December, 1874, the defendant Davies, at the plaintiff's offices, informed William G. Davies (who was attached to the law department of the plaintiff's business) that he was anxious about the value of the security, and desired to have the mortgage foreclosed, if any taxes or assessments upon the premises were unpaid; that thereupon William G. Davies made an examination of the books and papers of the company, and assured the defendant that there were no taxes or assessments unpaid, or interest in arrear; that defendant informed William G. Davies that if any taxes or assessments should be unpaid and in arrear, he wished the mortgage forthwith foreclosed for his protection, which William G. Davies, thereupon, and at several times thereafter, assured him should be done.

The learned judge declined to find these facts, and the defendant excepted.

We have examined the case to ascertain whether the judge before whom the witnesses were examined was justified in refusing to find the facts he was requested.

From such examination, we cannot conclude that the judge was in error in declining to find any portion of what was requested of him which is material to the just disposition of the case. And the case in that respect may well rest upon his decision. William G. Davies, who is a nephew of the defendant, and who was frequently consulted by him, in the plaintiff's offices, and elsewhere, in respect to his mortgages, has testified, that he could not have informed the defendant that there was nothing against the property, when interest was unpaid, the December interest being in



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Opinion of the Court, by VAN VORST, J.

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arrear, and that the entries of payment of interest were promptly made in the books; that the company's books did not at that time show what taxes or assessments were against the property; that he had not the information to give upon that subject; that he might have said that they knew of none; that he did not understand the defendant to direct or request that the mortgage should be foreclosed; that he very probably made a remark that he wanted it done if taxes and assessments accumulated.

Conceding that the plaintiff requested that the mortgage should be foreclosed, if taxes and assessments accumulated, and should be in arrear, does that amount to a "*full and explicit*" request to the plaintiff, to foreclose the mortgage?

The request, it must be observed, was made of a person, who, under the evidence, had no duty in his relations to the plaintiff in that direction.

The president and finance committee of the plaintiff were the persons who had the control of such matters; they directed the foreclosure of the company's mortgages. The person of whom the request was made was neither president nor member of that committee. He had no authority to direct or order the foreclosure of a mortgage.

When a request of this nature is to be made of a corporation, to be effective, it should be formally made, and communicated to one charged with the subject.

This is the more important, as a disregard of the request is followed by a release of a security. In large corporations, there must needs be a systematic distribution of duties among numerous officers and agents. And persons seeking to charge a corporation with notice to, or with acts or omissions of its agents, must see to it that the notice is communicated to, or that the act or omission proceeds from a person charged with a duty in the premises. By way of illustration,

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Opinion of the Court, by VAN VORST, J.

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a communication made to the discount clerk of a bank with respect to matters clearly not under his control, but within the specific duty of the notary, paying or receiving clerk, could not well be considered a good notice to the bank, by which it would be absolutely bound.

When a corporation is engaged in making investments of money, the duty of calling in loans is quite as important as that of making them. The decision in each instance must rest in responsible hands. The plaintiffs intrusted this duty to its chief officer and principal committee, with whom the defendant, who was not a stranger to the plaintiff's offices, should have formally communicated, and especially so, as his request to foreclose was conditional, accompanied with the added service, care and judgment, with respect to taxes and assessments.

But again : the defendant could not, through a notice to or request of William G. Davies, cast upon the plaintiff the duty of watching taxes and assessments, so as to guard against their accumulation.

That was a matter about which the defendant might himself have inquired, as his interest prompted, at the proper municipal offices where reliable records are kept.

The evidence shows that the books of the company did not, at that time, disclose what taxes and assessments were returned against the property, and that the plaintiff had in fact no information to give upon that subject, and could only obtain it by an inquiry at offices equally open to the defendant.

The person in the plaintiff's employment with whom the defendant communicated, according to his testimony, was not assigned to any duty of the nature of the one sought to be imposed by the defendant.

He was the assistant to the solicitor of the company in its law department. This department exam-

Opinion of the Court, by VAN VORST, J.

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ined vouchers, the surrender of death claims, and had the supervision of all litigated business and general direction of it. He had no right, as assistant to the solicitor, to order the foreclosure of a mortgage for non-payment of taxes.

Had William G. Davies, therefore, chosen to act in the direction requested, it must have been for the defendant, and in his interest, and for his omission, if any, the plaintiff is not liable.

But it is urged by the learned counsel for the defendant, that the plaintiff extended for a time the payment of the mortgage, at the request of Mr. Sage, the owner of a subsequent incumbrance. It appears that the plaintiff, in January, 1875, was about to foreclose the mortgage, and had placed the same in the hands of its attorneys for that purpose.

At this stage Mr. Sage came forward and paid the interest in arrear, and the expenses of the preliminary proceedings, and the mortgage was returned by the attorneys to the company. Mr. Sage, in August following, paid another installment of interest on the mortgage.

He testified that he was desirous of getting an opportunity to investigate the value of the property, and to that end made those payments. It is not shown that any agreement was made to extend the payment of the mortgage for a day.

The plaintiff simply forbore the collection of the debt which was due. However such forbearance of the creditor may prejudice the surety, it will not of itself have the effect to discharge him.

A naked promise to forbear, if one was made, would work no change in the antecedent relations of the parties.

The distinction between an agreement to give time, and time given irrespective of an agreement is important.

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Opinion of the Court, by VAN VORST, J.

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A creditor may refrain from taking proceedings, or abandon those he has commenced, provided he releases no lien, without discharging a surety (2 *Am. Leading Cases* [Hare & Wallace] notes to *Pain v. Packard*, and *King v. Baldwin*, pp. 390, 394).

There is nothing to show that the plaintiff was restrained by any agreement, for any length of time, from collecting the mortgage, and the defendant could, notwithstanding the payment of the interest in arrear by Sage, have at any moment paid the debt, and have been subrogated to the plaintiff's rights and remedies under the mortgage (*Calvo v. Davies*, in the court of appeals, per ANDREWS, J.).

The manuscript opinion in that case has been handed up with the papers.

This opinion fully recognizes the position and rights of the defendant Davies as surety, upon the facts appearing as above stated.

The judgment for a deficiency in this case is doubtless owing, in a large degree, to the accumulated taxes and assessments upon the premises, which were, by the judgment of the special term, directed to be paid out of the moneys arising on the sale of the land.

Some of these assessments accrued as early as the year 1872, and a considerable portion of the whole was a matter of record in the proper city offices in December, 1874, when the defendant had the interview with the assistant solicitor in the office of the company.

However unfortunate the result may prove to the defendant, we cannot think that the case would justify this court in casting upon the plaintiff the burden of paying these liens.

If the plaintiff was at all at fault in allowing them to accumulate through its forbearance to foreclose when the assessments first appeared, the defendant is not wholly free from responsibility. If the existence of these liens depreciated the security of the mortgage,

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and furnished a reason for its foreclosure, the defendant, whose pecuniary interest in the matter was large, could have readily acquired a knowledge of them, and by a seasonable and explicit request to the plaintiff, could have secured himself against any loss whatever.

We fail to discover any error in the proceedings on the trial or in the judgment.

Judgment affirmed with costs.

SEDGWICK and SPEIR, JJ., concurred.

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BENJAMIN DIETZ, PLAINTIFF AND APPELLANT, v.  
JOHN T. FARISH, DEFENDANT AND RESPOND-  
ENT.

HEAD-NOTE  
TO  
GENERAL TERM DECISION.

I. *Evidence.*

1. DELIVERY OF INSTRUMENTS SO AS TO MAKE THEM EFFECTIVE  
BETWEEN THE PARTIES.

(a) *Conclusive evidence of—what is not.*

1. Possession of an instrument under seal, is not.
2. Certificate of commissioner of deeds or notary public of proof of execution and delivery by subscribing witness is not.
3. Conjunction of possession and certificate is not.

(a) REBUTTING.—The inference of delivery arising from such possession, or certificate, or both, may be rebutted.

1. *Example.*—A contract for the sale and purchase of land was drawn out in duplicate, and the vendee, having signed both parts, handed them to the vendor for his signature, who, after having signed them, handed them to one P., to be signed by him as subscribing witness. P. signed both as a witness. While the

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papers lay on the table before P. it was suggested that before any further steps be taken towards the consummation of the contract, the proposed contract should be laid before A., the vendee's counsel, for his examination and approval. The suggestion was adopted and approved by the vendor. P. handed the duplicate forms of the proposed contract to the vendee; the vendor and vendee went together to A.'s office. A. not being in, the vendee handed the two forms and his check for \$2,000, to an attachee of the office, stating they were to be delivered to A., for his examination, and were not to be delivered to the vendor, unless A. on such examination approved of the contract. At this time a receipt for \$2,000, by the terms of the proposed contract to be paid on its execution, which had been indorsed on one of the forms, was by mutual consent erased. The vendee then left. Shortly after, the vendor, being about to leave, asked the said attachee for one of the forms, saying it belonged to him; the attachee objected. The vendor insisted, saying it was, or would be, all right, and he did take it, and went away. Some time after, a commissioner of deeds called at P.'s house with the form thus taken, and took the proof of P., as to its execution and delivery, and indorsed thereon his certificate of such proof. P. at this time had no knowledge either that the proposed contract had not been consummated, or that the duplicate writing embodying the same had not been duly delivered, or that any controversy touching the same had arisen. The contract was never approved of by A.

HELD,

*no delivery.*

HEAD-NOTE

TO

SPECIAL TERM DECISION.

(b) WHAT WILL NOT AMOUNT TO SUCH DELIVERY.

1. GENERAL PRINCIPLES.

(a) *Grantee's possession will not*, where such possession was obtained through a delivery by the grantor, with the intent that the grantee should not take it as the deed of the grantor, nor receive it as grantee, but as the agent of the grantor for a special purpose.

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## (c) WHAT WILL AMOUNT TO SUCH DELIVERY.

## (1) GENERAL PRINCIPLES.

(a) *Grantee's possession will*, when such possession was obtained through a delivery by the grantor, with the intent that the grantee should take it as the deed of the grantor, and receive it as grantee, *although there are conditions attached to the delivery*.

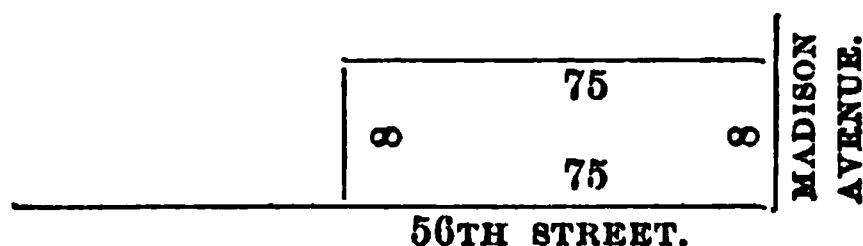
(b) *Grantor's possession*.—Although he retains the custody, yet, if the usual formalities of execution take place, and the instrument under seal is to all appearances consummated without any condition or qualification annexed, and the acts of the parties clearly evince their intention to be bound without a formal delivery, it is a complete and valid deed.

II. *Real property*.

## 1. MARKETABLE TITLE, WHAT IS NOT.\*

(a) *Location*.—Where there is *conflict of opinion* among competent men as to whether the whole of the premises contracted to be sold fall within the description of the conveyances through which the vendor claims to derive title thereto, *the title is not marketable*.

## 1. APPLICATION OF PRINCIPLE.\*



Plaintiff has not a marketable title to this strip.

Before SPEIR, VAN VORST, and SANFORD, JJ.

*Decided November 4, 1878.*

This is an appeal from the judgment of the special term of this court entered on July 17, 1877.

The action was brought to compel the specific performance of an alleged contract for the purchase and sale of a house and lot on the northwest corner of

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\* NOTE.—These propositions of the court below were approved of by Judge VAN VORST ; but do not appear to have been passed on by the general term.

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Madison avenue and Fifty-sixth street. The complaint was dismissed upon the merits.

The court below made the following findings of fact and law.

“I. That a few days prior to April 26, 1875, the plaintiff and defendant commenced a negotiation for the purchase and sale of the premises described in the complaint, and that they met at the office of the defendant, in William street, in the city of New York, for the purpose of continuing the negotiation. Mr. George W. Pell attended as the friend and adviser of the defendant, who was and is somewhat deaf. There was also present Mr. Alexander R. Robertson, the defendant's nephew. The price was finally agreed upon at fifty-eight thousand dollars—two thousand dollars of which were to be paid down, before the passing of title, on the consummation and delivery of the contract, which was to be in writing, and to be executed and delivered in duplicate. The plaintiff had brought to the office two printed forms of the proposed contract, and had himself written in each a description of the premises in question, but nothing more. The terms above mentioned having been settled, the two forms were passed to Mr. Pell by the plaintiff, who thereupon filled up the remaining blanks in the contracts with the terms of the proposed sale. The plaintiff then signed each form, and handed both to the defendant for his signature. The defendant signed each form, and thereupon handed both to Mr. Pell to be signed by him as a witness to the signature of the parties. Mr. Pell having signed each as a witness, and while both lay before him in his possession, it was suggested by the defendant or by Mr. Pell (and the suggestion adopted and approved by the plaintiff), in substance that before any further steps were taken towards the consummation of the contract, the proposed contract should be



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laid before Mr. Humphrey S. Anderson, the defendant's counsel, for his examination and approval; Mr. Anderson then and now being a member of the law firm of Messrs. Shipman, Barlow, Larocque & McFarland, of the city of New York.

“The plaintiff had recently purchased the premises at a foreclosure sale. The title of the premises had not been examined by or on behalf of defendant, nor was the defendant then in possession of any papers or documents relating to this property, or the title thereto, except the proposed forms of contract. The plaintiff and the defendant were strangers to each other, having only recently met in connection with this negotiation. The suggestion to lay the proposed contract before Mr. Anderson having been assented to, and the defendant having taken from his check-book a blank check in order to be prepared to pay the stipulated \$2,000 down in the event of Mr. Anderson's approval, the four persons above mentioned left the defendant's office, Mr. Pell parting from the other three as they reached the street, and the plaintiff, the defendant and Mr. Robertson going to the office of Mr. Anderson, 35 William street, in the city of New York. Before separating from the others as above stated, Mr. Pell, in whose possession the duplicate forms of the proposed contract had up to that time remained, handed both to the defendant, who took possession thereof. On reaching Mr. Anderson's office, the parties learned that Mr. Anderson was not in, but was expected soon to return. They were invited into Mr. Anderson's office, where all three of them remained for some little time waiting for Mr. Anderson's return. The defendant, having occasion to leave, expressed his intention not to wait any longer. Thereupon Mr. James R. Collins, the cashier and book-keeper of the said firm of Messrs. Shipman, Barlow, Larocque & MacFarland, having been called in, the defendant handed to him the said two

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proposed forms, and a check for \$2,000, drawn by the defendant, and payable to the order of Messrs. Shipman, Barlow, Larocque & MacFarland, saying to him that the same were to be delivered to Mr. Anderson for examination on his return, and were not to be delivered to the plaintiff, unless Mr. Anderson on such examination approved the contract. Thereupon, with the consent of the plaintiff and defendant, Mr. Collins erased or obliterated from one of the forms a receipt for \$2,000, which had been written thereon and signed by the plaintiff. The defendant then went away, leaving plaintiff, Mr. Robertson and Mr. Collins in Mr. Anderson's office. Shortly thereafter, the plaintiff expressed his intention to leave, and asked Mr. Collins for one of these forms, saying that it belonged to him. Mr. Collins objected to delivering either of them to the plaintiff, and called the plaintiff's attention to the purpose for which they had been left with him by the defendant. The plaintiff, however, insisted upon taking one, that he said belonged to him, saying in substance that it was, or would be, all right, and he did take it, and then also went away. The form so taken by the plaintiff is the one on which this action is brought.

"II. Some time afterwards the paper so taken by the plaintiff aforesaid was presented to Mr. Pell, the subscribing witness thereon, for acknowledgment. The commissioner before whom the acknowledgment was made called at the house of Mr. Pell, in the city of New York, in the evening, presented the paper to him and received the acknowledgment. Mr. Pell, at the time of making this acknowledgment, had no knowledge that the proposed contract had not been consummated; that the duplicate writings embodying the same had not been duly delivered, nor had he any knowledge that any controversy touching the matter had arisen.

"III. That the said contract for the purchase and

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Statement of the Case.

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sale of the premises in question was never concluded between the plaintiff and defendant; that the same was never approved by Mr. Humphrey S. Anderson, the defendant's counsel, but on the contrary was disapproved of by him, and that the \$2,000 were never paid over to the plaintiff.

"IV. On the 15th of May, the plaintiff called at Mr. Anderson's office and tendered to Mr. Anderson a deed of the premises in question, demanding at the same time the consideration money, viz. : \$58,000. Mr. Anderson declined to receive the deed and pay the money demanded, on the ground that there was no existing contract between the plaintiff for the purchase and sale of the premises, and also on the ground that the plaintiff's title to the premises was defective.

"V. That the premises in question, as well as the premises for a considerable distance on each side of the premises in question, were originally a part of the common lands belonging to the mayor, aldermen and commonalty of the city of New York.

"That in 1796 a map of said common lands was made and the said lands were laid out in lots thereon, by Casimir Th. Goerck.

"That a strip of at least eight feet in width, of the premises in question, and extending the whole length thereof, is included in lot 77 of said common lands as laid out on said Goerck map.

"That by the map on file in the office of the comptroller, and known as Fifty-sixth street Opening, Benefit and Damage Map, confirmed by the supreme court, December, 1837, said strip of eight feet in width of the premises in question is laid down as the property of John Mason. Said strip of eight feet in width of the premises, being the first eight feet north of the northerly line of Fifty-sixth street as laid out and at present existing, belonged to lot 77 of said common lands; also according to the following public and authentic maps

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Statement of the Case.

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accepted and acted upon by conveyancers generally, made at the instance of the said city and on file in the office of the comptroller and the street commissioner of said city, to wit, map of 'The Adjustment of the Boundary Lines of the Common Lands' on file in the said comptroller's office; map of the 'New York common lands as surveyed and laid out into lots in the year 1796, by Casimir Th. Goerck, showing the same as affected by the avenues and streets laid out by the commissioners appointed by the legislature, resurveyed in the year 1822, by order of the corporation of New York, Isaac Ludlam, City Surveyor,' and 'Randel's map, No. 8, between Third and Sixth avenues,' No. 30, both of which last mentioned maps are on file in the office of the said street commissioner.

"That by deed dated the first day of November, A. D. 1823, and recorded in the office of the register of the city and county of New York, in liber 172 conveyances, page 234, on the 12th day of November, 1823, the mayor, aldermen and commonalty of the city of New York, conveyed said lot 77 to one John Mason.

"That the plaintiff claims to have derived title to the premises in question from the mayor, aldermen and commonalty of the city of New York, as being part of lot 80 of said common lands, through a deed of conveyance thereof, by the said mayor, aldermen and commonalty to one Kemp.

"That no evidence was offered on the trial of any deed of conveyance of said lot 77, or of any part thereof, by said mayor, &c., to any other person than to said John Mason, and no evidence was offered by the plaintiff of any title to the premises or any part thereof derived by him or his grantors from said John Mason, or from any one claiming title to said premises through him or through his heirs or assigns.

"The plaintiff, however, showed that Otto Sackers-

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Statement of the Case.

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dorf, a civil engineer and surveyor of the city, made an actual survey for the purpose of determining the location of plaintiff's premises, not only with reference to the location of lots 77 and 80 as shown on some of the maps above referred to, but also with reference to existing street lines; that in making said survey, the said Sackersdorf started from a point on Forty-second street, which is conceded to be correct; and that upon such survey said Sackersdorf found that with reference to existing street lines, the southerly line of lot 80 of the said common lands runs south of the northerly line of Fifty-sixth street, as laid out and existing, and that the whole of plaintiff's premises are included in and covered by lot 80.

"In consequence of the conflict of opinion thus shown to exist among competent men as to location, the plaintiff, as the case stands, neither at the time of the alleged contract between himself and defendant, (but which contract I find not to have been concluded) nor at any subsequent time, had, nor has he now a marketable title to the premises described in the complaint.

"Upon the foregoing facts I find as conclusions of law :

"That the defendant is entitled to judgment dismissing plaintiff's complaint upon the merits thereof with costs, &c.

"I therefore decide and direct that the defendant have judgment against the plaintiff for the dismissal of the complaint upon the merits thereof, and for his costs and disbursements in this action."

Upon the findings, judgment was entered dismissing the complaint upon the merits.

From this judgment plaintiff appeals.

In the court below the following opinion was delivered.

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Opinion of FREEDMAN, J., at Special Term.

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“FREEDMAN, J.—This is an action to compel the specific performance of a contract for the sale and purchase of real estate.

“The defense is twofold : first, that the contract was never concluded, so as to be binding upon the parties ; and, secondly, if it was, that a defect existed in plaintiff's title.

“Upon these issues evidence was introduced by both sides, and upon such evidence several interesting questions of fact and of law arise.

“As to the facts I shall only say, that upon a proper application of the rules which govern in the consideration of testimony, the evidence preponderates so largely in favor of the defendant, that he is entitled to have his version concerning the transactions constituting, as plaintiff claims, an execution and delivery of the contract adopted as the true one. So far as necessary, the facts thus established will be referred to hereafter.

“As to the law, the learned counsel for the plaintiff strenuously insisted that in every aspect which may be taken of the case, there was in law a perfect execution and delivery of it, and that such execution and delivery could not be varied by proof of annexation of conditions.

“This claim, in view of the facts as actually determined, is a bold and startling one, and in consequence thereof, I felt induced to make, and did make, before coming to a conclusion thereon, a careful examination of the principles of law which govern in the matter of the execution and delivery of contracts. The conclusions at which I arrived after such examination, may be stated to be as follows :

“A contract or agreement is the union of two or more minds in a thing done or to be done. In the language of some of the old writers, it is called ‘a coupling or knitting together of minds.’

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Opinion of FREEDMAN, J., at Special Term.

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“The assent of the parties must be mutual, reciprocal, and concurrent.

“There must necessarily be some medium of communication, by which the union of minds may be ascertained and manifested. Among men, this medium is language, symbolical, oral or written.

“In oral and symbolical communications, when the parties are together, the assent is mutual and the contract completed, when the acceptance of one party is announced to the other.

“In written communications, and especially in cases where the law requires the assent to be evidenced by a writing, the writing must be delivered by the party to be bound thereby in such a manner as to deprive him of the right to recall it.

“The delivery may be by words without acts ; as if a deed be lying upon a table, and the grantor says to the grantee : ‘Take that as my deed,’ it will be a sufficient delivery ; or it may be by acts without words, and therefore a dumb man may deliver a deed.

“The intent is the governing and controlling element in the determination of the question whether a contract has or has not been concluded in a given case. Established forms and ceremonies furnish useful indications of intention, but in themselves, and in the absence of mutual and concurring intention meeting in the same sense to the same point and embracing the same subject matter, they are inoperative. This is a rule of universal jurisprudence, and applies to all classes of contracts.

“Thus, although the mere consent of the parties is sufficient for the perfection of consensual contracts, nevertheless, if in agreeing upon a sale or any other bargain, they also agree that there shall be a formal act passed before a notary with the intent that the bargain shall not be deemed perfect until the notarial act is so likewise, the parties, though they may have



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agreed upon the terms, may recede before the act is complete (*Pothier on Obligations*, art. I. Ev. p. 110).

“Referring to the same principle under another title, Mr. Bell, in his very learned commentaries on the law of Scotland (7th Ed. McLaren, Book III. part 1, p. 345), says: ‘The plea of *locus pœnitentiæ* is grounded not merely on the want of evidence of a bargain, but on the want of that perfect and full consent which stands contradistinguished from imperfect resolution or intention. The want of evidence may be supplied by a reference to oath; the want of the badge of full and perfect consent never can be so supplied. Such evidence may supply the loss of the document, after it has been completed as an irrevocable engagement; but it will not destroy the privilege of receding, where the irrevocable obligation has not been legally declared.

“In the case of a contract under seal or a deed, therefore, the *locus pœnitentiæ*, the opportunity of withdrawing from it before the parties are finally bound, exists up to the time of its actual delivery as a living obligation.

“If the grantor do not intend that his deed shall take effect until some condition is performed, or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time.

“If he deliver it as his deed to the grantee, it will operate immediately, and without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery. This is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object.”

“But it is only in cases falling strictly within the exception stated, that is to say, in cases of delivery of



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the deed with intent to part with it as a deed and for the benefit of the grantee, that the law, for reasons of public policy, fails to carry out the intention of the parties as expressed in the condition annexed to the delivery, and rejects parol evidence as to such condition (*Worrall v. Munn*, 5 *N. Y.* 229; *Braman v. Bingham*, 26 *Id.* 483; *Cocks v. Barker*, 49 *Id.* 107).

“If, though there be a delivery to the grantee, the deed is delivered with the intent that the grantee shall not take it as the deed of the grantor, nor receive it as grantee, but as the agent of the grantor for a special purpose,—as for instance, for the purpose of transmitting it to a third person to be held by the latter in escrow,—the case does not come within the exception (*Gilbert v. North American Fire Insurance Company*, 23 *Wend.* 43).

“A deed may be deposited with the grantee or handed to him for any purpose other than as the deed of the grantor, or as an effective instrument between the parties, without becoming at all operative as a deed (*Ford v. James*, 2 *Abb. Ct. of App.* 159, per GROVER, J. 163).

“Formerly the law was that delivery in escrow must be to a stranger, and that if made to the grantee’s authorized agent, the delivery has the same effect as if made to the grantee personally. But this rule has since been invaded by numerous acknowledged exceptions. Thus in *Watkins v. Nash* (*L. R.* 20 *Eq. Cas.* 202; *S. C.*, 13 *Moak’s Eng. R.* 781), Vice-Chancellor HALL had occasion to pass on the question of delivery in escrow to the solicitor of a party to the deed, and sustained the apparent intent of the parties against a strict construction of the technical rule, that delivery to the agent of the grantee cannot be in escrow.

“It appeared that defendant’s solicitor, Skyrme, represented to plaintiffs that his client wished to pay off a mortgage, which the plaintiffs, as trustees, held

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on Nash's estate, and at Skyrme's request, to facilitate the transaction, as he said, they executed a reconveyance and delivered it to him expressly as an escrow, and took a writing declaring it to be such. Skyrme used the reconveyance to get the money from his client, which he appropriated, and then returned the reconveyance, pretending that the payment was not made.

"The vice-chancellor laid down the broad explanation of the old rule, that when a stranger was spoken of, 'What is meant is a delivery of a character negating its being a delivery to the grantee, or to the party who is to have the benefit of the instrument. Moreover, the delivery to the solicitor of the grantee might be deemed a delivery to a third person for the benefit of all parties.'

"On the other hand, if the usual formalities of execution take place, and the contract under seal is to all appearances consummated without any conditions or qualifications annexed, and the acts of the parties clearly evince their intention to be bound without a formal delivery, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor (*Scrughan v. Wood*, 15 *Wend.* 545, and cases there cited). Here again the law regards the duly authenticated intention of the parties, rather than mere ceremonial formalities. It even regards the mere possession of the document as a non-essential, but the decisive and conclusive evidence of the intention of the parties as the operative and controlling feature.

"I think I have now sufficiently demonstrated for the purposes of the case before me, that, except where reasons of public policy intervene, it is the invariable policy of the law, in determining the question of the execution and delivery of a contract, to give full effect to the true intent and meaning of the parties, so far as the same can be ascertained from the surrounding cir-

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cumstances, and that in this respect the law is in full accord with right reason, and substantial justice.

“The claim advanced by the learned counsel for the plaintiff, that notwithstanding the agreement of the parties that delivery should take place upon the approval of the contract by counsel, the bare execution of it under seal, so far as it was executed, imparted binding force to it, and is not only sufficient, but conclusive evidence of the existence of a valid contract, involves, therefore, a misconception of the true relations of legal principles.

“At the time it was agreed between the parties to make the delivery of the contract, and the payment of the first installment required by it, dependent upon the approval of defendant’s counsel, it had not yet been delivered, either by words without acts, or by acts without words.

“It was still under the control of the defendant, and his opportunity for withdrawing had not yet expired. Not even a qualified or conditional delivery had been made to the plaintiff. The defendant thereupon took both duplicates into his possession, and both parties proceeded to the office of defendant’s counsel.

“The latter not being in, both duplicates, together with a check for the amount of the first installment required to be made by the contract, were left by the defendant for his counsel, with instructions, in case of approval, to deliver one of the duplicates and the check to the plaintiff. The contract was never approved, nor were any of the papers handed by said counsel or with his knowledge or consent to the plaintiff. Hence there was no valid delivery. The mere fact that plaintiff, against the express understanding of the parties, managed to get hold of one of the duplicates, is not sufficient to enable him to maintain the action.

“Nor can it avail the plaintiff that he succeeded in subsequently inducing Mr. Pell, the subscribing wit-

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ness, to acknowledge before a commissioner the execution and delivery of the instrument, when, as appears from the evidence, the said witness at the time of making such acknowledgment had no knowledge that the contract had not been concluded, or that the duplicates had not been duly exchanged, and was not aware that any controversy touching the matter had arisen, but had every reason to believe that a delivery had taken place. True, he should not have made the acknowledgment, unless he knew the fact to be as he stated, and his course in that respect is highly reprehensible.

“But I do not see why the consequences of his unauthorized act should be visited upon the defendant.

“Even the record of a deed, after acknowledgment, is only *prima facie* evidence of a delivery, and as such it may be rebutted (Jackson v. Perkins, 2 Wend. 308; Gilbert v. North Am. Fire Ins. Co. 23 Id. 43).

“In my findings I have set forth with great particularity all the circumstances touching the execution of the contract, its deposit in the office of defendant's counsel, and the manner in which plaintiff got possession of the duplicate upon which he brought this action.

“It is, therefore, not necessary to enlarge upon them here. Suffice it to say, that upon the facts as thus established, plaintiff has failed to show that the said contract for the purchase and sale of the premises in question was ever concluded so as to have any binding force whatever.

“In regard to the alleged defect in plaintiff's title, I have come to the conclusion that upon the evidence as it stands, the plaintiff did not have a marketable title to the premises described in the complaint.

“The facts being as found, the case is not one for a specific performance. This relief is always discretionary, and will never be granted except it be strictly

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equitable under all circumstances that it should be granted.

“The defendant is entitled to judgment dismissing the complaint upon the merits, with costs.”

*Sigismund Kaufman*, attorney, and *Lewis and George N. Sanders*, of counsel, for appellant, among other things, urged:—I. Under the evidence the delivery was complete (*Lady Superior v. McNamara*, 3 *Barb. Ch.* 378; *Verplank v. Sterry*, 12 *Johns.* 548; *Kedner v. Keith*, 15 *Com. B. N. S.* 42; *Ward v. Lewis*, 21 *Hun*, 520; *Siegfried v. Tavain*, 6 *Serg. & R.* 311; *Hallenbeck v. Dewitt*, 2 *Johns.* 404; *Russell v. Croy*, 12 *Id.* 427; *Wheaton v. Fay*, 62 *N. Y.* 283; *Braman v. Bingham*, 26 *Id.* 492; *Bigelow on Estoppel* [2nd Ed.] 241; *Worrall v. Munn*, 5 *N. Y.* 238; *Cocks v. Barker*, 49 *Id.* 110; *Lawton v. Sayer*, 11 *Barb.* 351; *Zanor v. Wickeham*, 2 *H. of L.* 296).

II. Under the statute, it was only necessary for the instrument to “be subscribed by the party by whom the sale was made;” that is, by plaintiff (See 3 *Rev. Stat.* [Banks’ 6th Ed.] p. 141, § 158, and many authorities cited in foot-note 3, among others, *Levy v. Brush*, 8 *Abb. Pr. N. S.* 423–4; *Tallman v. Franklin*, 14 *N. Y.* 591–2; *Ballard v. Walker*, 3 *Johns.* 62–3, approved and cited *in extenso* in *Justice v. Lang*). According to the three following authorities considered together, the instrument, even if not operative as a deed, appears to be valid evidence, as a memorandum of the completed contract, under the statute, especially where there has been no objection raised to its admission. The especial attention of the court is directed to this interjected point, if they should deem it necessary (*Bowles v. Woodson*, 6 *Gratt.* 78, 88; *Parrill v. McKinley*, 9 *Id.* 1, 6; *Justice v. Lang*, 30 *How.* 434–5; affirmed 42 *N. Y.* 523–4).

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III. Three cases are cited in the special term opinion : *Gilbert v. North American Fire Ins. Co.*, 23 *Wend.* 43. In this case, which was a suit between third parties as to a policy, it was allowed to be shown that the nominal grantee of the deed of the property insured had received the deed simply to deposit it with a third person as an escrow, which had been done, and there being no contest between the parties to the deed, parol proof was admissible in an action between third parties according to the settled rules of evidence ; but that case is criticised and disposed of in *Braman v. Bingham*, 26 *N. Y.* 492, where the eminent Judge SELDEN, delivering the opinion of the court of appeals, says : " But if the grantee had retained the deed, claiming that its delivery to him was absolute, and in a contest between him and the grantor, parol proof of a conditional delivery had been offered, I think the result would have been different. If I am wrong in this conclusion, the case discloses an avenue for the overthrow of titles by parol proof, which was supposed to be closed." This case is likewise distinguished in *Cocks v. Barker*, 49 *N. Y.* 110, where it is cited with *Worrall v. Munn*. *Ford v. James*, 2 *Abb. Ct. App. Dec.* 163. In this case it was a deed-poll, and the grantor's attorney handed it to the brother of the nominal grantee to submit it to the grantee for his consideration, and the opinion properly says that this " transaction between Edward D. James (the brother of the grantee) and Charles S. Spencer (grantor's attorney), had none of the essential requisites of a delivery." Edward merely acted as a messenger, and his brother refused to receive the deed. A comparison of this case with *Worrall v. Munn* (*supra*), shows that it is not in point at all. *Watkins v. Nash*, *L. R.* 20 *Eq. Cas.* 262. Here the deed was delivered to a solicitor, not authorized to receive it, and who gave an express writing that he only held it to be returned in two days ; he returned it to the grantor, and took up

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his receipt, and the decision holds, that the solicitor came under the denomination of "a stranger" to whom a delivery in escrow might be made.

IV. Defendant's authorities are not in conflict with those of plaintiff. In *Pym v. Campbell*, 6 *El. & B.*, the opinion was based on the fact that the instrument was not under seal. *Davis v. Jones*, 17 *Com. B.* 634. Contract not under seal (see p. 626) and opinion, says (p. 634): "It is competent for a party to show that it was delivered only as an escrow, which clearly does not apply to sealed instruments delivered to the party,—and the case of *Murray v. Earl of Stair*, cited in the opinion, was that of a bond delivered to third party as an escrow. *Cocks v. Barker*, 49 *N. Y.* 107. The misapprehension of defendant in citing this, one of plaintiff's authorities, can only be appreciated when it is seen that it not only is in plaintiff's favor, but moreover unites with *Braman v. Bingham*, 26 *N. Y.* 491, in distinguishing defendant's authority, *Gilbert v. N. Am. Fire Ins. Co.* 23 *Wend.* 43, in favor of plaintiff, instead of approving it in the sense that defendant cites it, for it is cited as concurring with *Worrall v. Munn*, *supra*. *Burrell v. Root*, 40 *N. Y.* 496. Mere dicta from a dissenting opinion, and not in point at all. *Hawkes v. Pike*, 105 *Mass.* 562. Rather in plaintiff's favor, for there the grantee was not present, and the opinion says: "No definite or specific formality is prescribed by law; but it must be the concurrent act of the two parties;" from which it follows that it would have been complete if the grantee had joined, as in the case at bar. *Wallis v. Littrell*, 11 *Com. B.* 375. Not under seal. This decision is based on *Pym v. Campbell* (*supra*), and speaking of the writing not under seal, says, its suspension by oral agreement "is in analogy with delivery of a deed as an escrow," showing clearly, by reference to the case of *Pym v. Campbell*, that if it had been a deed, the parties would have been



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estopped from denying the absolute delivery. *Lindley v. Lacey*, 17 *Com. B. N. S.* 585. Instrument not under seal. It likewise cites *Pym v. Campbell* (see p. 587). *Graves v. Dudley*, 20 *N. Y.* 77. The action was not between the grantor and grantee, but by bailor against his bailee for money deposited with him,—a third party and a stranger—to be returned upon condition, and was founded upon a written agreement. Again, there was no contract by deed between the parties—it was simply a deed-poll by another person, not a party to the action. Lastly—The plaintiff declined to accept the deed, without a proper acknowledgment, the validity of which he doubted. In the case at bar no question was raised by any one as to the form or validity of the contract, and no question was raised on the trial as to its sufficiency in any respect, either by the defendant or his attorney, who became witness, but simply as to the ability of plaintiff to comply with the contract he had made. It was beyond criticism, being drawn up by the experienced Pell.

V. The plaintiff proved title under a referee's deed under a judgment of foreclosure and sale, and possession under the deed. The regularity of the judgment of foreclosure and sale was admitted by the defense. The only attack made upon the title thus established is by the production of a deed from the city to John Mason, dated November 5, 1873. This deed was only "offered in evidence for the purpose of showing the subject matter of the discussion between Mr. Anderson and Mr. Levinger." And its effect in evidence was limited to that, and could not be used for anything else (*Codd v. Rathbone*, 10 *N. Y.* 39; *Williams v. Mech. & Traders' Fire Ins. Co.*, 54 *Id.* 580; *Coleman v. People*, 55 *Id.* 81). There is no evidence that the city had title in lot 77 of common lands. There is no evidence that John Mason ever existed or accepted the deed, or went into possession. There is no evidence that John Mason's heirs or grantees were not cut off by the judg-



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ment of foreclosure and sale, the regularity of which is admitted. The defendant offered in evidence certain maps—not one of which was proven to have been made from actual survey. There is no proof at all about them, except that the maps were produced from the comptroller's office, or made by Holmes. The only real map of the premises was made by Otto Sackersdorf, civil engineer and city surveyor of twelve years' standing, and employed in department of public works, from an actual survey, assisted by Mr. McLean, a city surveyor, and an assistant. The map of common lands, made by Goerck, coincides with the present street lines at the northeast corner of Forty-second street and Fifth avenue. The maps of Goerck, Randall and Ludlam, all coincide at the same initial point, to wit, Forty-second street and Fifth avenue. Starting from this point by actual measurement, these three surveyors ran their lines along Forty-second street to Fourth avenue, past Madison, to determine the point at which to turn up Madison avenue; having determined that point, they ran the line up Madison. On the Goerck map, the blocks, including streets, are laid out at two hundred and sixty feet to the block, while the actual block, as laid out, is two hundred and sixty feet ten inches. From Forty-second street to Fifty-sixth street there are fourteen blocks.

Total calculated distance from north side Forty-second street to northerly boundary of lot 77, lands of John Mason, as laid down on Goerck map, fourteen blocks, at two hundred and sixty feet to the block, makes . . .	3,640 ft.
Fourteen blocks as laid out, at two hun- dred and sixty feet ten inches to the block, makes . . . . .	3,651ft. 8in.
A difference of . . . . .	11ft. 8in.
But the actual survey shows the north- erly side of Fifty-sixth street to be north of Forty-second street . . .	3,651ft. 6½ in.

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In other words, Randall laid out the streets ten inches a block wider from street to street than the same blocks as laid down on the Goerck map of common lands, which carried the northerly side of Fifty-sixth street eleven feet eight inches north of the southerly line of lot 80, the lands of John Kemp—the premises in question—and the same distance north of the northerly line of lot 77, the lands of John Mason, so that the premises in question are located eleven feet eight inches north of any part of lot 77, the lands of John Mason.

Evidence of Sackersdorf: “Q. Have you run any lines on this map, to show where Fifty-sixth street could have been on the Goerck map? A. Yes, sir; that green line shows where the Goerck map could have made it. Q. And the black line shows what? A. It shows the line according to Randall, or rather as I measured it on the ground, that is almost coincident with Randall, within one inch and five-eighths; Randall makes that line one inch and five-eighths further north than we make it. Q. Had Fifty-sixth street been laid out according to the old Goerck plan, would the center have come below the present northerly boundary of the street? A. The center would have been certainly south.”

Since 1804, there has been no dispute about the title conveyed to John Kemp by the deed of the city to him, and there is absolutely no evidence that there is any one *in esse* who makes any adverse claim to the premises in question. In the description of the property sold by the referee to plaintiff, no reference is made to the common land lots 77 or 80, and there is nothing to show that the referee or his grantors claimed solely under a grant from John Kemp. The regularity of the judgment having been conceded, it was for the defendant to show title in some one else. The map of the premises made by Holmes located the house forty-

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nine feet south of lot 80 ; over forty feet more than the other maps would warrant. The learned judge below has found that a strip of about eight feet in width of the premises in question, and extending the whole length thereof, is included in lot 77 of the common lands as laid out on the Goerck map, and he bases his finding upon a map from the comptroller's office, known as Fifty-sixth street opening, benefit and damage map, which the learned court says was confirmed by the supreme court, December, 1837, of which there is no evidence whatsoever. The map is dated in December, 1837, and was made solely for the purpose of apportioning the benefit and damage to adjoining owners on Fifty-sixth street, and not to determine any boundaries, and was not proven to have been made from an actual survey, or by a surveyor. An adjustment map of boundary lines, also not proven, and Isaac Ludlam's map and Randall's map, none of which were proven to have been made from actual surveys. And the Randall map was never offered in evidence, and is not an exhibit in the case. That by a deed dated November 12, 1873, the city conveyed lot 77 to John Mason, of which there is no evidence, the deed having been admitted for a special purpose and limited to that. The plaintiff claimed title under a judgment *in rem*, a decree of foreclosure and sale, and the regularity of the judgment being conceded, it remained for the defense to show an outstanding title in some one else who had not been made a party to the foreclosure suit, or who had not been cut off by some former proceeding. The referee's deed makes no reference to any deed from the city to John Kemp ; the thing sold was under a decree condemning the *rem* described by metes and bounds. To defeat a title thus obtained it is necessary to trace down from some superior grantor, an outstanding adverse title in some person *in esse* at the date of the decree of foreclosure and sale. The property is described as bounded by Madison

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avenue and Fifty-sixth street, and not limited by the lots of common land. The judgment is conclusive until set aside (*Williams v. Amroyd*, 7 *Cranch*, 423; *Hudson v. Guestier*, 6 *Id.* 281; *Gelston v. Hoyt*, 3 *Wheat.* 313). The learned court has found, as a matter of fact, that the actual survey made by Mr. Sackersdorf, plaintiff's witness, was made by starting at a point on Forty-second street, which is conceded to be correct. This finding, which is supported by all of the maps, reduces the location of the premises to one of pure mathematics. Given, the fixed point, the northeast corner of Forty-second street and Fifth avenue, and the intersection of Madison avenue and Forty-second street, to locate the northwest corner of Fifty-sixth street and Madison avenue, with reference to boundary of lots 77 and 80 of the common lands. First ascertain the distance of said boundary from Forty-second street as laid down on Goerck map of common lands, there are fourteen lots at two hundred and sixty feet each, three thousand six hundred and forty feet, which is the exact distance from the north side of Forty-second street, to the common boundary of lots 77 and 80, common lands. But the north side of Fifty-sixth street, as actually laid out, is eleven feet eight inches north of this boundary line of lots 77 and 80. The north side of Fifty-sixth street running eleven feet eight inches north of the southerly boundary of lot 80.

Distance by actual survey from north side of Forty-second street to the north side of Fifty-sixth street, as surveyed by Otto Sackersdorf, Mr. McLean, and an assistant surveyor, is . . . . .	3,651 ft. 6¾ in.
Calculated distance on Goerck's map of common lands to northern boundary of lot 77, lands of John Mason, fourteen blocks at two hundred and sixty feet a block . . . . .	3,640 ft.
Difference . . . . .	11 ft. 6¾ in.

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Which is the distance the premises in question are north of lot 77.

V. As a conclusion, the court found, not that the plaintiff did not have title to the premises, but by a confusion caused by unproved maps, that he did not have a marketable title. Which confusion is not based upon any fact in the case. The alleged defect in this title runs through every title of every lot of land from Forty-second street to Seventy-third street, and has existed since 1822, and if the finding of the court below be sustained, it will shake the very foundation of the titles of all the land included between those streets, and open the door to a flood of litigation, which will be without parallel in the history of our jurisprudence. From such a result it is the imperative duty of this court to defend its suitors. And the decision has already been the cause of great uneasiness and expense in the investigation of titles and making of surveys.

*Shipman, Barlow, Larocque & Macfarland*, attorneys, and *W. W. Macfarland*, of counsel, for respondent, urged :—I. No contract of purchase and sale was consummated between the plaintiff and defendant. 1. In the first place, it may be well to notice the peculiar idea which seems to be entertained by counsel for the plaintiff, that the mere possession by the plaintiff of a paper purporting to be a contract signed by the defendant is not only sufficient but conclusive evidence of the existence of the contract and the delivery of the appropriate evidence thereof, no matter how he became possessed of it. *Scrugham v. Wood*, and that class of cases are relied upon, in support of this proposition. That case (15 *Wend.* 545) merely affirms a principle antecedently well established, that the law regards the duly authenticated intention of the parties in such cases, rather than mere ceremonial formalities,

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and is in principle directly opposed to the notion above referred to. Hence, it was held, as it had many times before been held, that the formal and solemn execution of a deed, attended with the usual declaration by the grantor of its execution and delivery in the presence of a witness or of witnessess, is not rendered inoperative by the mere fact that the grantor retains possession of the document itself. The law regards the mere possession of the document as non-essential, but the decisive and conclusive evidence of intention thus indicated as the operative and controlling feature. *Ward v. Lewis* (4 *Pick.* [21 *Mass.*] 518), is in accordance with this principle. *Cocks v. Barker* (49 *N. Y.* 107); *Worrell v. Munn* (1 *Seld.* 229); *Burrell v. Root* (40 *N. Y.* 46), are all equally foreign to the question under consideration. In none of these cases was there any question about the due execution and absolute delivery of the deed. Assuming the delivery to have been absolute, the question was whether, in accordance with settled legal principles, it could be attended with qualifying parol conditions, and the contrary thereof was held. These cases may, therefore, be dismissed without further observation. 2. On the other hand, *Gilbert v. North American Fire Insurance Co.*, a case cited with approbation in *Cocks v. Barker* (49 *N. Y.* 107), is precisely in point against the proposition of the learned counsel for the plaintiff (see also 23 *Wend.* 43; 2 *Kent Com.* 477; *Addison on Cont.* ch. 26, § 2; 1 *Chitty on Cont.* 20; *Mactier v. Firth*, 6 *Wend.* 103, 112; *Pothier on Obligations*, art. I. § 1, p. 105; § 11, p. 106; art. II. p. 110; *Bell's Comm. Law of Scotland* [7th Ed., McLaren, Book iii. part 1, p. 345; *Addison on Cont.* ch. 26, § 2, p. 937; *Pym v. Campbell*, 6 *El. & Bl.* 370; *Poor v. Petch*, 10 *Exch.* 613; *Davis v. James*, 17 *Com. B.* 13, 634; *Lindley v. Lacey*, 17 *Com. B. N. S.* 578; *Wallace v. Little*, 11 *Id.* 369; *Hawkes v. Pike*, 105 *Mass.* 560; 4 *Kent Com.* 454, 12 Ed.).

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II. If the contract had been perfected as claimed by the plaintiff, the defect in the plaintiff's title would be a bar to his right to enforce a specific performance. (1.) This relief is always discretionary, and will never be granted except it be beyond doubt, and, in the strictest sense of the term, equitable, under all the circumstances, that it should be granted (1 *Story's Eq.* [Redfield's Ed.] §§ 742, 740, 758; *Fry on Specific Performance*, ch. I.). (2.) The seller must be able to offer the purchaser a spotless title, entirely free from blemish or any defect that may expose him to the least inconvenience (*Chitty on Cont.* Am. Ed. 1,496-7, and cases cited in the notes. See especially, *Garnet v. Macon*, 2 *Brock.* 185, 244; *Hendricks v. Gillespie*, 35 *Gratt.* 193-4). Having regard to this principle, the court will perceive that, according to the map of Holmes (who, whatever else may be said of him, is conceded on all hands to be a surveyor of the first ability and authority), the property in question is altogether on the land conveyed to Mason by the city as a part of lot 77 of the common lands. It should be borne in mind that this lot No. 77, as described in the deed, is two hundred and sixty feet in width, and not simply two hundred feet, as some of the lots are as described in deeds by the city. The court will also see that the titles to lots 77 and 80 have a common source, viz., the city. But passing by Holmes's map altogether, and taking into account only the various authentic and public maps prepared by authority, acted upon and confirmed by the supreme court, of which maps one is the map under and according to which Fifty-sixth street, on which these premises are located, was opened, and on which the benefits and damages on the opening of that street were determined and confirmed by the supreme court—a strip of the premises in question, at least eight feet in width, running along the whole length thereof, and cutting off eight feet of the house, belongs to lot 77—



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the Mason lot—and not to, lot 80. As to this strip of eight feet, all the maps in all the public offices agree. (See Holmes's map, pp. 136, 140; map of Fifty-sixth street opening, map of adjustment of boundary lines of the common lands, Randall's map, 160; Ludlam's map), *prima facie*, therefore, the plaintiff and those under whom he claims never had title to the premises which they undertook to convey. It is hardly necessary to observe that the burden of proof was upon the plaintiff to remove, if possible, this manifest defect in his title (1 *Gr. Ev.* ch. VII.).

BY THE COURT.—SPEIR, J.—The defendant contends that a contract of purchase and sale was never consummated between the plaintiff and the defendant, and that, had the contract been perfected as claimed by the plaintiff, the defect in plaintiff's title is a bar to his right to enforce a specific performance.

Where the trial is without a jury it is undoubtedly the duty of the court to take the responsibility of examining the evidence and to determine the facts. Evidence upon both issues was properly introduced by the parties and has been carefully examined. From all the testimony, as well as from the conduct of the parties at the time the papers were submitted for counsel's perusal and approval, and when the plaintiff took into his own custody the duplicate copy on which the suit is brought, it is to my mind conclusively shown that the plaintiff never came into the possession of the contract through a delivery thereof by the defendant or any one authorized by him to make such delivery.

No addition to or variation from the terms of a written contract can be made by parol; but in this case the first defense is that there never was any contract of purchase and sale consummated. So far as necessary, the facts establishing this conclusion will be referred to hereafter.



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Opinion of the Court, by SPEER, J.

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The position taken by the plaintiff's counsel is that a written instrument purporting to be a contract executed by the defendant under seal, in the possession of the plaintiff, is not only sufficient but conclusive evidence of the existence of the contract and evidence of the delivery thereof.

The production of a paper purporting to be a contract by a party with his signature attached, undoubtedly affords a strong presumption that it is his written contract, and if in fact he did sign the paper *animo contrahendi*, the terms in it are conclusive and cannot be varied by parol evidence. But here it was conclusively proved that after the papers were signed by the parties in duplicate and the execution thereof witnessed it was inquired of the plaintiff if he had a good title to the property. He said "he had bought it of a referee, and that was the best kind of title." Upon the suggestion being made that the papers had better be taken to defendant's counsel for his examination and approval they were accordingly, by consent of both parties, submitted to the counsel, and his approval was not had. Whatever took place thereafter cannot affect the legal status of the parties as fixed by the controlling facts. There was no formal delivery, either upon condition or otherwise, nor any intent that the defendant should take the contract as grantee of the premises until the examination and approval had been procured. Courts and juries will look upon defenses of this kind with suspicion unless there be good grounds to sustain them, but if it be proved that in fact the paper was signed with the express intention that it should not be a contract unless something else be done, the other party cannot fix it as a contract upon those so signing it (*Payne v. Campbell*, 6 *El. & B.* 379). Even though the plaintiff had put the duplicate contract, which he had taken away with him without right, upon record, it would be only *prima facie* evidence of a delivery,

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Opinion of the Court, by SPENCER, J.

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which might be rebutted (*Jackson v. Perkins*, 2 *Wend.* 308).

The defendant's counsel urges that in this regard a broad distinction is to be taken between the delivery of a deed and an instrument in writing not under seal.

The principle is elementary, and can best be ascertained by reference to the early books. The doctrine is clearly stated in 1 *Shep. Touch.* 59: "Where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed than if I had laid it by me, and not delivered it at all, and therefore in that case, albeit the party get it into his hands, before the conditions be performed, yet he can make no use of it at all, neither will it do him any good" (*Viner Abr.* tit. *Faits*, O, pl. 4, 1; 2 *Rolle*, 25, 1, 40). The principle is laid down by KENT, Ch. J., in his earliest reported cases: *Jackson v. Catlin* (2 *Johns.* 258); *Dunlap v. Jackson* (1 *Johns. Cas.* 114), and see *Gilbert v. North American Fire Ins. Co.* (23 *Wend.* 43); *Hindley v. Lucy* (*Com. B.* 17 *N. S.* 578). This application of the text cited from the above writers is practically illustrated by the case at bar in all its features.

The case of *Xenos v. Wickham* (2 *House of Lords*, *L. R.* 17 *N. S.* 578) is cited as an authority for the plaintiff. A policy of insurance purported to be "signed, sealed and delivered," by two of the directors of an insurance company in the presence of their secretary, and according to the powers vested in the directors by the deed of settlement of the company, was taken as against the company to be conclusive that it was not only signed and sealed, but also duly delivered. The assured, in the case, had effected the insurance through a broker, and the company signed and sealed the policy and kept the possession of it, and the court held that it was not necessary that the assured should formally accept or take away a policy in

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Concurring opinion of VAN VORST, J.

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order to make the delivery complete. He had a right to rely upon the policy in the company's hands as a deed for his security. The broker desired that the policy should be canceled, which was done by the assent of the underwriter, and it was held that this could not affect the assured, who had not, in fact, given the broker any authority to cancel the policy. The decision below was reversed, and as it appears upon just grounds; but the decision contains the exception, which, in my judgment, renders the case an authority for the defendant. The exception is embodied in the decision, which is: "A policy, signed, sealed and delivered, is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it."

The case is not one for a specific performance. The relief calls to a great extent for the exercise of discretion, and will not be granted where there is a material variation between the terms of a contract, as alleged and as proven in regard to the subject matter of the contract (*Philips v. Thomson*, 2 *Johns. Ch.* 418; *Finch v. Parker*, 49 *N. Y.* 1). Besides, it appears that it was not in the power of the plaintiff to convey the premises to the defendant at the time of the commencement of the action, except subject to an outstanding mortgage.

Judgment should be affirmed, with costs.

VAN VORST, J., concurring.—The reasons assigned by Judge FREEDMAN in his clear and able opinion at special term, upon the facts found, justify the judgment rendered by him, and for those reasons, as well as those assigned by my brother SPEER, the judgment should be affirmed.

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Statement of the Case.

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HENRY McDERMOTT, PLAINTIFF, v. THE  
LYCOMING FIRE INSURANCE COMPANY,  
DEFENDANT.

I. *Insurance Law.*

1. CONDITIONS PRECEDENT.

(a) *Notice and proofs of loss.*

1. The loss under a policy was not payable until sixty days after due notice and proof of the same should have been made by the assured and received at the office of the company in accordance with the terms and provisions of the policy. By the terms and provisions of the policy, persons sustaining loss or damage were required to "*forthwith* give notice of said loss to the secretary of the company, and *within thirty days after said loss*" to "render to the secretary a particular account of such loss," containing certain specified matters.

HELD,

that the giving of such notice and the rendering of such account were conditions precedent.

(b) *Time, essence of contract.*

1. The prescribed time within which the account is to be rendered is of the essence of the contract. A strict compliance is necessary.

(a) *Nine days after the time is too late.*

(c) WAIVER OF NON-COMPLIANCE AS TO TIME.

1. *Retention of proofs; statement at time of serving that they would not be received as proofs; is not.*

(a) Proofs were rendered nine days too late; the agent of the company on whom they were served (according to the evidence most favorable to the plaintiff) said "they would not accept these as proofs of loss." Four days after this, plaintiff's attorneys were notified that the proofs were too late. The company retained the proofs and did not return or offer to return them.

Before SPEIR and SANFORD, JJ.

*Decided November 4, 1878.*

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Plaintiff's points.

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Exceptions ordered to be heard at general term.

The action is brought to recover the sum of \$5,000 under a policy of insurance issued by the defendant to that amount upon the dwelling and boarding-house of the plaintiff, and the furniture therein, and a renewal of the policy and its continuance in force to July 2, 1875, subject to all the conditions in the original policy.

The property insured was destroyed by fire on December 15, 1874.

At the close of the trial, upon motion of defendant's counsel, the court directed the jury to find a verdict for the defendant. The exceptions were directed to be heard at the general term in the first instance.

The facts pertinent to the questions discussed appear sufficiently in the opinion.

*Edward S. Clinch*, attorney, and of counsel, for plaintiff, urged :—I. The defendant cannot avail itself of any provision in the policy not pleaded in its answer, and this case must be determined solely by the provisions pleaded. If there be in the policy any provision for forfeiture for non-compliance with its terms, that provision must be disregarded (*McMaster v. Ins. Co. of N. A.*, 55 *N. Y.* 233 ; *Richtmeyer v. Remsen*, 38 *Id.* 206 ; *N. Y. C. Ins. Co. v. N. P. Ins. Co.*, 20 *Barb.* 468).

II. Contracts of insurance do not in any respect differ from other written instruments, but are interpreted by the same rules (*Savage v. Howard Ins. Co.*, 52 *N. Y.* 504) ; and conditions precedent in them will be construed strictly against the insurers, who impose them for their own benefit, where a failure to comply with such conditions is claimed to work a forfeiture (*Walsh v. Ins. Co.*, 32 *N. Y.* 427 ; *Hitchcock v. North Western Ins. Co.*, 26 *Id.* 69 ; *White v. H. R. Ins. Co.*,

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Plaintiff's points.

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15 *How. Pr.* 288). In the absence of any notice by the defendant to the plaintiff, that a failure to comply with the provisions of the policy in respect to the service of proofs of loss will work a forfeiture, the courts cannot under any proper rules of construction, and should not in equity, supply the defect, if there be any, and give that effect to the provision which the provision itself does not say it shall have (*McMaster v. Ins. Co. of N. A.*, *supra*; *Bumstead v. Dividend Mut. Ins. Co.*, 12 *N. Y.* 81; *Bennett v. Lycoming Co. Mut. Ins. Co.*, 67 *Id.* 274).

III. The language of the provision pleaded is directory, and no penalty being provided for a failure to strictly comply with it, it has not the effect of a mandatory provision, or one absolutely essential to be followed with exactness (*Savage v. Howard Ins. Co.*, *supra*; *People v. Cook*, 8 *N. Y.* 67, 89).

IV. It is uniformly held that the clause of a policy requiring proofs of loss, is to be liberally construed in favor of the insured (Cases cited under second point). And therefore substantial compliance with such clause is sufficient to charge the insurers (*Bennett v. Lycoming Co. Mut. Ins. Co.*, *supra*; *Bumstead v. Dividend Mut. Ins. Co.*, *supra*).

V. The report of the case of *Blossom v. Lycoming Fire Ins. Co.* (64 *N. Y.* 162), upon the authority of which the court below directed a verdict for the defendant, does not disclose the form of the policy, or whether the answer set up as matters of defense any other provision of the policy than that requiring proofs of loss to be served within thirty days, and there was in that case no evidence of a waiver by the defendant of this provision of the policy (Opinion of ALLEN, J.); but it did appear that the proofs of loss were served one hundred and twenty-one days after the fire, and that all the court held was, that a substantial compliance with the provision of the policy was necessary

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Plaintiff's points.

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to enable the plaintiff to recover, and that there was no substantial compliance by the insured.

VI. A substantial compliance with the terms of a contract refers either to the time or to the manner of its performance, irrespective of the time of the performance. In each case, unless time is made especially of the essence of the contract, and non-performance of the terms of the contract by the one is to the detriment of the other party, a substantial compliance is all that will be required, and this whether the condition be precedent or subsequent (*Smith v. Gugerty*, 4 *Barb.* 614; 2 *Parsons on Contracts*, 461; 3 *Id.* 384; *Brashier v. Gratz*, 6 *Wheat.* 533 [MARSHALL, Ch. J.]).

VII. Whether there was a waiver by the defendant of the provision of the policy respecting the service of proofs of loss, was a question for the jury (*Flanders on Ins.* [2nd Ed.] 576; *Franklin Fire Ins. Co. v. Hamill*, 6 *Gill [Md.]* 87; *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 *N. Y.* 507). And this question was fairly raised by the testimony. The defendant's witness testified that the proofs of loss have been in defendant's continuous possession since they were first received, and that at the time the proofs of loss were served on the company, the person making the service (plaintiff's witness, Garrett) was told they were too late. Garrett testified that at this time he was told that the company would not accept the papers as proofs of loss—an objection not to the time of service, but to the form of the papers. Again, it was not until four days after the service of these papers that the defendant's agents notified Mr. Clinch that the proofs were served too late. If this notice had been given when the proofs were served, there was no necessity for this letter, and the fact that it was written is evidence of the failure to have given the notice previously. This testimony certainly entitled the plaintiff to have the question submitted to the jury, and his

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Defendant's points.

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exception to the court's refusal to submit it was well taken.

VIII. The remaining exceptions of the plaintiff to the court's refusal to submit questions to the jury should be sustained. The facts presented in the requests were material, and the jury should have been permitted to pass upon them.

IX. Slight evidence of waiver is sufficient to defeat a forfeiture, and courts of justice will not give effect to a forfeiture unless compelled to do so (*Ripley v. Ins. Co.*, 17 *How. Pr.* 444; *Hincken v. Mut. Ben. Life Ins. Co.*, 50 *N. Y.* 657; *Walsh v. Washington Ins. Co.*, *supra*).

X. The notice to Mr. Clinch contained in the letter of January 27, 1875, was not a notice to the plaintiff, and was inoperative so far as it is claimed to be a notice to plaintiff that the proofs were too late. Mr. Clinch was employed simply to prepare and have the proofs of loss served, and was not an agent or attorney of the plaintiff for any other purpose. While it is true that to the person making the service the defendant would be entitled to make any objections to the reception of the proofs of loss, with the same effect as if he were the plaintiff, it is also true that with the service of the proofs the agency or attorneyship ended, and that any subsequent communication with such agent or attorney would not be a communication to the plaintiff (*Story on Agency*, § 140). The following cases also were cited: *Planters' Mutual Ins. Co. v. Deford*, 38 *Md.* 382; *Wightman v. West. Mar. and Fire Ins. Co.*, 8 *Rob. La.* 442; *Phillips v. Pulman Fire Ins. Co.*, 28 *Wis.* 472; *Lippold v. Continental Ins. Co.*, 3 *Neb.* 391; *Egleston v. N. Y. Life Ins. Co.*, U. S. Supreme Court, decided April 29, 1878, not reported.

*Edward B. Cowles*, attorney, and of counsel, for



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Defendant's points.

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defendant, urged:—I. In order to entitle plaintiff to recover, he must prove compliance with all the conditions on his part to be done and performed. The conditions in the policy, as to giving notice forthwith, and within thirty days serving particular account of loss, are and have been held to be conditions precedent. One of the earliest insurance cases which establishes this point is that of *Worsley v. Wood* (6 *Term Rep.* 710). The rule stated in this early case is the law of to-day (*Inman v. Western Fire Ins. Co.*, 12 *Wend.* 452; *Howard v. City Fire Ins. Co.*, 4 *Den.* 508; 2 *Philips on Ins.* 653, 655; *Flanders on Ins.* 535, 563, 564, 567, 578, 593; 2 *Am. Leading Cases*, 920, 924, 925; *Ripley v. Ætna Ins. Co.*, 30 *N. Y.* 136; *Beatty v. Lycoming Co. Mut. Ins. Co.*, 16 *P. F. Smith*, 9; *Bennett v. Lycoming Co. Mut. Ins. Co.*, 67 *N. Y.* 274; *Cornell v. Milwaukie Mut. Ins. Co.*, 18 *Wis.* 257; *Mason v. Harvey*, 20 *Eng. Law & Eq.* 541; *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 *N. Y.* 500; *Blossom v. Lycoming Fire Ins. Co.*, 64 *Id.* 162; 3 *Kent Com.* [7th ed.] 454).

II. Plaintiff offered no proof showing or tending to show that he gave notice forthwith to the secretary of the defendant company, or to the company itself, in any way save the account of loss thirty-nine days after the fire. This alone would preclude him from recovering (*Inman v. Western Fire Ins. Co.*, 12 *Wend.* 452, 460, 461).

III. But more than this, he has failed in another respect which is fatal and irremediable. The policy calls for a particular account of loss to be served on the secretary within thirty days after the loss. The account was not served within the thirty days, and he therefore cannot recover (*Blossom v. Lycoming Fire Ins. Co.*, 64 *N. Y.* 162; *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 *Id.* 506; 2 *Am. Leading Cases*, 920, 924, 925; *Beatty v. Lycoming Co. Mut. Ins. Co.*, 16 *P. F. Smith* [9 *Penn.*] 9; *Ripley v. Ætna Ins. Co.*, 30

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Opinion of the Court, by SPEIR, J.

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N. Y. 186). The only manner in which this defect in plaintiff's case could be remedied would be by : 1. Proof of something which defendants said or did before the thirty days elapsed, which justified the plaintiff in believing that proofs of loss would not be required, and caused him to omit serving the same in time ; or, 2. An express waiver founded upon consideration after default. Neither of these elements are found in this case.

IV. The plaintiff strives to remedy the defect in his case by urging that he complied substantially with the provisions of the policy in that he served a particular account of loss thirty-nine days after the fire instead of thirty. But the trial judge rightly gave effect to the provisions of the policy, which embody the contract of the parties. Departure from that would lead to the most absurd results. If nine days too late is sufficient, ten must be ; if ten days, then ten months, and so on to any length of time. On the principle contended for by plaintiff the court, instead of enforcing the contract which the parties have made, would nullify it and provide a new one. The plaintiff has misinterpreted the doctrine of substantial compliance. It applies to matters of form, but not to those of time (See cases, *supra*).

BY THE COURT.—SPEIR, J.—Among the multitude of provisions in and connected with the policy in this case, and by which the defendants have attempted to shield themselves from liability, the following need only be considered.

The policy provides that persons sustaining loss or damage by fire shall forthwith give notice of said loss to the secretary of the company, and, within thirty days after said loss, shall render to the secretary a particular account of such loss, signed and sworn to by them, stating any and what other insurance has been

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Opinion of the Court, by SPEER, J.

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made on the same property, giving copies of the written portions, &c. &c.

It is claimed on the part of the defendant that these conditions as to giving notice *forthwith* to defendant's secretary and serving within *thirty days* after the fire a particular account of loss, &c., were not complied with as to time.

The defendant was a Pennsylvania company, and in July, 1873, when the policy was issued, Chamberlain & Co. were its local agents at New York, who countersigned it. The renewal of the policy, which was in force at the time of the fire was also countersigned by the agents in New York. On January 23, 1875, nine days after the time limited by the policy had expired, Mr. Clinch, the plaintiff's attorney, served a particular, verified account of loss on defendants at the New York agency of the company. The defendants' witness testified when the proof of loss was served upon the defendants they immediately answered "that the proofs of loss were too late, and that they would notify them in a few days." The plaintiff's witness testified that the defendants stated at the time these papers were served that "they would not accept them as proof of loss." On January 27, 1875, two days after the service, the agents addressed a note to the plaintiff's attorney stating "that the papers purporting to be proof of loss from Henry McDermott, of Far Rockaway, L. I., left at their office January 23, 1875, were too late." The proofs of loss remained in the continued possession of the defendants.

It is not claimed that the plaintiff gave notice of the loss by fire forthwith to the secretary of the defendant's company, as required by the policy, or any notice whatever, excepting the account of loss, which was served thirty-nine days after the fire.

There can be no question that the notice of loss by fire to be forthwith given to the secretary of the com-

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Opinion of the Court, by SPEER, J.

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pany, and the service upon defendant, within thirty-days after the loss, of a particular account verified by the plaintiff, of other insurance made on the same property, are conditions precedent. Whether the plaintiff has entered into an improvident contract or otherwise, has nothing to do with the case. It is sufficient that the insurer and insured have agreed upon the terms of the contract, and its validity must be upheld by force of these terms and conditions. If lawful in themselves, whether reasonable or unreasonable, the parties alone must determine. In this respect contracts of insurance, like other written instruments, are construed to give effect to the intention of the parties as indicated by the language employed by them (*Phil. on Ins.* § 122; *Springfield F. and M. Ins. Co.*, 43 *N. Y.* 394). When the language used is susceptible of different constructions, it is undoubtedly the duty of the court to give to the stipulations a fair and reasonable interpretation. Here there is no ground for a difference of opinion as to the positive purport and meaning of these provisions.

The plaintiff requested the court to submit the question to the jury whether there was a waiver of these provisions.

Upon an attentive review of the case I can find no evidence of a waiver of these conditions by the defendant. It does not appear that the plaintiff and defendant had any negotiation or communication whatever with each other or their agents, directly or indirectly, in relation to the matter, until the expiration of thirty-nine days after the fire. The defendant had not done or said anything before the thirty days had elapsed which could justify the plaintiff in believing that proof of loss would not be required, and thereby cause him to omit serving the same in time. In retaining the account of the proofs of loss there certainly was no waiver of the condition. At the time of serving the

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Statement of the Case.

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verified account required by the policy upon the defendant, the plaintiff had forfeited his rights under the policy. There can be no waiver of a condition precedent except there be in the case an element of estoppel (*Underwood v. Farmers' Joint Stock Ins. Co.*, 57 *N. Y.* 506). In *Ripley v. Aetna Ins. Co.*, 30 *N. Y.* 136, the rule is laid down by MULLEN, J. He says: "It seems to me that a waiver, to be operative, must be supported by an agreement founded on a valuable consideration; or, the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of condition."

Judgment should be ordered for defendant on the verdict, with costs.

SANFORD, J., concurred.

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CHARLES C. HARRISON, ET AL., PLAINTIFFS  
AND RESPONDENTS, v. WILLIAM R. ROSS, ET  
AL., DEFENDANTS AND APPELLANTS.

I. BROKER TO SELL AND PURCHASE.

1. *Sold note.*

(a) "COLLECT AT OUR OFFICE." CONSTRUCTION OF PHRASE.

A sold note signed by the brokers stated the parties on whose account the sale was made, and then contained the following: "Send invoice and bill of lading to our office. Collect at our office."

Held,

*not authority for payment by the vendees to the brokers.*

Before SPEIR and SANFORD, JJ.

*Decided November 4, 1878.*

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Statement of the Case.

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The defendants appealed from a judgment entered upon a verdict of a jury under the direction of the court, and from an order denying a motion for a new trial upon the minutes.


The plaintiffs are sugar refiners, doing business in Philadelphia. They sue to recover a balance of \$2,981.52 and interest, for two hundred and fifty barrels of crushed sugar, claimed to have been sold by them to the defendants, doing business in Montreal, Canada.

The answer alleged, in substance, that pursuant to an offer by Dayton & Co., to procure and furnish to them sugars, at certain prices specified by them, Dayton & Co., to be paid for on delivery, they gave Dayton & Co. an order to procure and ship to them a certain quantity of sugar at the prices named; that pursuant to said order Dayton & Co. did ship to them two hundred and fifty barrels of crushed sugar, for which they, on the receipt thereof, paid to Dayton & Co. the purchase price thereof; and then proceeded: "And these defendants, upon information and belief, aver that the sugars so shipped to them by said Dayton & Co. are the same sugars referred to in said complaint, and were purchased by them from said plaintiffs, and that by the terms of said purchase the same were to be paid for to said Dayton & Co. at their office in the city of New York, as the agents of said plaintiffs, within thirty days after the same were so purchased; but these defendants allege and aver that at the time they received and paid for said sugars, they had no knowledge that the same had been so purchased from said plaintiffs, and that they paid for the same at the office of said Dayton & Co., in the city of New York, within thirty days after the same were so purchased by them."

It appeared on the trial that the sugar was sold

## Statement of the Case.

through Dayton & Co., brokers, in the city of New York, and that the contract of sale was as follows :

DAYTON & Co., 113 Water Street, New York.	<p style="text-align: right;">"NEW YORK, April 30, 1875.</p> <p>Sold for account of Messrs. HARRISON, HAVEMEYER &amp; Co., To Messrs. W. R. Ross &amp; Co., 250 bbls. stand. crushed sugar, at 11½ 4—30 days.</p> <p>For export. Mark :  Montreal. Await directions.</p> <p>Ship by Clyde's Line <i>via</i> Providence, and send invoice and bill of lading to our office. Collect at our office.</p> <p style="text-align: right;">"DAYTON &amp; CO."</p>
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It also appeared that about June 9, 1875, plaintiffs wrote the defendants the following letter :

"Franklin Sugar Refinery,  
 "HARRISON, HAVEMEYER & Co.,  
 "Office, 101 South Front Street,  
 "Philadelphia, June 9, 1875.  
 "Mess. W. R. Ross & Co.,  
 "Montreal, Canada.

"Dear Sirs :

"The contract rendered us by Mess. Dayton & Co. calls for a settlement of our bills in 30 days, at their office in New York.

"We have not as yet been paid for your bill 5 May. Will you please put Mess. Dayton & Co. in funds—if you have not already done so—and instruct them to accept our draft for amount now overdue?

"Yours truly,  
 "HARRISON, HAVEMEYER & CO.

"BRIAN."

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Appellants' points.

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There was a great deal of other testimony, which is not material, as it has no bearing on the propositions contained in the head-note.

*Johnson & Cantine*, attorneys, and *F. C. Cantine*, of counsel, for appellants :—I. The evidence at the trial justifies the theory that the defendants dealt with Dayton & Co. as principals ; that the latter were permitted by the plaintiffs, either designedly or through their negligence, to sell the sugar in question as their own and to collect the price from the defendants ; and that the defendants, having paid Dayton & Co. for the sugar, discharged their liability therefor.

II. The expression in the sale note, “ collect at our office,” can only be interpreted to mean that the price of the sugar should be collected by Dayton & Co. at their office in New York, and not by the plaintiffs in Philadelphia. It is analogous to the case of a note payable at bank. The plaintiffs themselves so interpreted it. It is also manifest from the tenor of Mr. Frazier’s testimony, and of the plaintiffs’ letters to Dayton & Co., that they never expected to collect the moneys due for their sugar, sold by Dayton & Co., themselves.

III. The theory, upon which the plaintiffs apparently proceeded at the trial, that Dayton & Co. were the agents solely of the defendants, was wholly unwarranted by the testimony.

IV. The defendants have paid for the sugar, not only in accordance with the contract of sale, but in compliance with the wishes and instructions of the plaintiffs expressed in the letter of June 9 ; and to require them to pay it again is repugnant alike to justice and to the law of the case. If any mistake has occurred, it is not the fault of the defendants, who performed their whole duty in the premises, but the



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Respondents' points.

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result of the plaintiffs' negligence in omitting to notify them in season not to pay Dayton & Co.

*Mann & Parsons*, attorneys, and *John E. Parsons*, of counsel; for respondents:—I. The sugar was sold by the plaintiffs to the defendants. Dayton & Co. were employed by the defendants to purchase the sugar. They merely acted as brokers in the transaction.

II. Before the defendants placed any funds in Dayton & Co.'s hands they knew that the plaintiffs were the sellers of the sugar. This is quite immaterial. They knew that somebody was the seller of the sugar; that they were the purchasers; and that they could only discharge themselves by payment. In point of fact, however, they did know that the sugars were purchased from the plaintiffs before sending any money to Dayton & Co.

III. The remittances by the defendants to Dayton & Co. were not intended to be on account of the plaintiffs' bill.

IV. The only question in the case is whether the provision of the contract, "send invoice and bill of lading to our office, collect at our office," had the effect of making the plaintiffs chargeable for money received by Dayton & Co. from the defendants. This cannot be successfully maintained. 1. The invoice referred to was the bill of the plaintiffs. According to the contract it was a bill against the defendants. The provision that it should be sent to Dayton & Co.'s office meant simply that the plaintiffs were to send there for payment of the bill. The bill of lading was to be sent there. That is, the sugar was to be delivered to the defendants at the office of Dayton & Co. Sending the bill there did not constitute payment. 2. A person residing in Boston buys of Messrs. Tiffany & Co. a bill of jewelry, and directs his bill to be sent to his New York agent. Does that constitute payment of the bill?

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Respondents' points.

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Do Messrs. Tiffany & Co. thereby accept the responsibility of the agent? In such a case the agent does not even assume the responsibility of payment. Neither did Dayton & Co. do so in this case. 3. And so, again, though the contract contains the expression, "collect at our office," the deposit by the defendants of money there did not pay the bill. "Collect" means "obtain the money," "receive the money." The plaintiffs were to collect. They were to receive the money. Unless they did so receive it, it was not collected by them. A promissory note is very frequently made payable at the bank in which the maker keeps his account. Even that does not constitute payment (*Hill v. Place*, 5 *Abb. Pr. N. S.* 18, special term, affirmed by general term). No question of negligence is involved. The plaintiffs pressed Dayton & Co. They failed. 4. It was a matter of indifference to the plaintiffs where the bill was to be paid; that which was essential was, that it should be paid. They acquiesced, therefore, in the provision of the contract that the bill should be collected at Dayton & Co.'s office. This assumed that the defendants would see that the bill was paid there, and they were required to do so. In accordance with this construction of the contract the plaintiffs, on June 9, 1875, wrote to the defendants, informing them that the bill had not been paid, though they had drawn upon Dayton & Co. for payment, and requesting the defendants to put Dayton & Co. in funds, and to instruct them to accept the draft; in other words, to instruct them to pay the bill. If Dayton & Co. had accepted such a draft, that would not constitute payment unless it was specifically so agreed (*Clafin v. Ostrom*, 54 *N. Y.* 581; *Roberts v. Fischer*, 43 *Id.* 159). 5. The defendants may maintain that this letter authorized the remittance of funds by the defendants to Dayton & Co. on the plaintiffs' account. This is not so: First, because the letter follows the provisions of

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Opinion of the Court, by SPEIR, J.

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the contract, which requires the defendants to put Dayton & Co. in funds, and to see that they pay the plaintiffs' bill: and, Second, because no money was remitted to Dayton & Co. by the defendants upon or after the receipt of this letter.

BY THE COURT.—SPEIR, J.—[After reviewing the evidence and arriving at the conclusion that upon the undisputed evidence and facts the sale was made through Dayton & Co., who acted as brokers for both seller and buyer, that defendants had knowledge before they placed any funds in the hands of Dayton & Co., that the plaintiffs were the sellers of the sugar; that the remittance to Dayton & Co. was not intended to be on account of plaintiff's bill; and that plaintiffs, in fact, received but \$1,000 from defendants, for which due credit was given, proceeds:] The only question in the case is whether the provision of the contract—"send invoice and bill of lading to our office, collect at our office,"—had the effect of charging the plaintiffs for money received by Dayton & Co. from the defendants. The invoice mentioned here is the plaintiffs' bill sent to the defendants with the shipment of the sugar. The contract informs the defendants that the sale was made on account of the plaintiffs to them, and the bill is made against them and calls for payment. The defendants were not authorized to pay to Dayton & Co., although payment was to be made at their office. The general rule is, that a broker employed to buy or sell, has no authority to receive payment. The exception to the rule prevails where the broker is clothed with the *indicia* of authority to receive payment, especially where the principal is not disclosed (*Russell on Fac. and Brokers*, 48 *Law Lib.* 68-110; *Cassel v. Thornton*, 3 *Car. & P.* 352; *Higgins v. Moore*, 34 *N. Y.* 417). The defendants were apprised by the contract and the bill received from the plaint-

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Statement of the Case.

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iffs, that the goods were bought from the plaintiffs, and payment was due to them, to be made at the office of the brokers. The main defense relied on was: that at the time the sugars were received and paid for they had no knowledge that the same had been purchased from the plaintiffs. The contrary was affirmatively proved by the testimony of one of the defendants, and what is still more conclusive, the payments made to Dayton & Co. were made before the time of payment had expired, and were made on an arrangement with them by which a currency price had been converted into a gold price, and after the receipt of the plaintiffs' bill by the defendants.

The judgment and order should be affirmed with costs.

SANFORD, J., concurred.

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OTTO KROMER, PLAINTIFF AND RESPONDENT, v.  
ANTON HEIM, DEFENDANT AND APPELLANT.

I. *Estoppel.*

1. EXCESS OF INVOICE PRICE OF GOODS OVER CONTRACT PRICE.

(a) Where an agreement calls for the delivery by a debtor to his creditor of goods at certain prices *in payment* of the debt, and the goods are delivered with bills having the prices annexed, and the creditor does not return the goods, an objection that the prices contained in the bills were in excess of those stipulated for, comes too late, and the delivery of the goods must be taken as payment, to the extent of the prices contained in the bills.

II. *Accord and satisfaction.*

1. STIPULATION TO SETTLE JUDGMENT.

(a) *When it and the acts done under it will not sustain a plea of accord and satisfaction.*

1. A plaintiff's attorney made a stipulation, signed by him

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Statement of the Case.

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alone, whereby he agreed to accept in settlement of a judgment held by his client, goods to a certain amount, to be delivered by the judgment debtor to the judgment creditor or on his order, and upon delivery of goods to the specified amount, then to take for the balance of the judgment an assignment by the judgment debtor of his interest in a certain patent and the assets of such patent business; the judgment debtor, after having delivered goods to the specified amount, tendered an assignment of the patent and of the assets of the business, *which the judgment creditor refused to accept.*

HELD,

not an accord and satisfaction of the judgment.

(b) *What would sustain the plea.*

If in above put case the judgment creditor *had accepted* the assignment, there would have been an accord and satisfaction.

III. *Substituted agreement.*

1. REQUISITE TO CONSTITUTE.

(a) That creditor has a right of action on it.

1. *Application.*

(a) In above put case the stipulation was held not to be a substituted agreement, because the defendant being under no obligation to do anything whatever under it, there was no consideration for it and the plaintiff had no right of action on it.

Before SPEIR and SANFORD, JJ.

*Decided November 4, 1878.*

This is an appeal from an order of the special term denying an application of the defendant to set aside an execution and to compel satisfaction of a judgment.

The motion rose under the following stipulation.

“NEW YORK SUPERIOR COURT.”

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OTTO KROMER	}	Judgment \$4,334.08, entered June 24, 1876.
<i>against</i>		
ANTON HEIM.		

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“Plaintiff will accept in settlement of the above

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Statement of the Case.

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judgment \$3,000, and an assignment of defendant's interest in Kromer & Ohlemacher belt clasp improvement patent, and assets of said patent business, if paid within one year in cash; or if defendant pays \$250 in cash at the date hereof, and \$250 cash within thirty days from date hereof, and \$250 in belting within thirty days.

“\$500 in merchandise in four months.

“\$240 in cash in six months.

“\$250 in merchandise in eight months.

“\$500 in merchandise in twelve months,

and \$500 in merchandise every four months, until the said judgment is paid. Interest to be charged to the amount of the judgment unpaid, and when said judgment shall all be paid, except the amount of one thousand dollars remaining unpaid, plaintiff will accept a transfer of defendant's interest in said belt clasp patent and assets, and allow said \$1,000 therefor.

“The belting and merchandise must be furnished by the defendant on as favorable terms as would be allowed by J. B. Hoyt & Co., or New York rate for cash sales, and of a good merchantable quality, and such belting shall be shipped by defendant to such parties as the plaintiff may direct, and the freight paid in advance and charged to the account, and the amount paid for freight shall be deducted out of the next installment or payment by defendant to plaintiff.

“No goods to be shipped by defendant without orders from plaintiff.

“In case of defendant's insolvency or failure to comply with the foregoing, plaintiff will not be bound to allow \$1,000 for said belt clasp patent, and this stipulation is terminated. If defendant complies with the foregoing stipulation, I will not docket the judgment or issue execution thereon, and until defendant makes or shall be in default in one of said payments for ten days, all proceedings on said judgment shall be and

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Appellant's points.

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the same are hereby stayed, and upon the performance hereof by the defendant, said judgment shall be satisfied and discharged by the plaintiff.

“New York, July 26, 1876.

“J. W. FEETER, Att’y for Otto Kromer, Pl’ff.’

Defendant alleges that he delivered such merchandise, pursuant to the terms of the stipulation, as to leave remaining unpaid on the judgment only \$1,000, and that he thereupon tendered to the plaintiff a transfer of his interest in the belt clasp patent and assets; which plaintiff refused to accept.

Plaintiff claimed that he was not bound to accept the assignment: 1. Because defendant shipped the goods to him at prices in excess of those fixed by the stipulation, the overcharge thereby created being \$577.08. 2. Because there is nothing in the stipulation which renders it obligatory on him to accept the assignment.

The motion was referred, and the referee denied it.

The report of the referee was confirmed at the special term, and thereupon the order was made from which this appeal is taken.

*D. M. Porter*, attorney, and of counsel, for appellant:—I. An accord and satisfaction was established. 1. The stipulation was good as an accord. The plaintiff relies upon the cases of *Noe v. Christie* (51 *N. Y.* 270), and *Tilton v. Alcott* (16 *Barb.* 598), but they are distinguishable from this case. There is an element in this case which was not in those. Here the property was to be manufactured, and was to be delivered in quantities to suit, and in such quantities as the plaintiff might direct, except the belt clasps, which the plaintiff already had, and the patent, of which he was joint owner. The agreement to manufacture and deliver is a consideration more beneficial to the plaintiff than an agreement to pay the judgment in full in cash. The

## Appellant's points.

case at bar therefore falls with the cases of *Coit v. Houston*, 3 *Johns. Cas.* 243; *Payne v. Barnet*, 2 *Marsh.* 312; *Watkinson v. Inglesby*, 5 *Johns.* 386; *Billings v. Vanderbeck*, 23 *Barb.* 546; *Steinman v. Magnus*, 2 *Camp.* 124; 1 *East*, 390; *Bradley v. Gregory*, 2 *Camp.* 383; *Wood v. Roberts*, 2 *Stark.* 417; *Boothby v. Sowden*, 3 *Camp.* 175; *Howard v. Norton*, 65 *Barb.* 161; *Philips v. Bergen*, 2 *Id.* 608; *Good v. Sherman*, 2 *B. & Ad.* 328; *Pinnell's Case*, 5 *Rep.* 117; *Andrew v. Boughey*, *Dyer*, 756; *Corwin v. Clark*, 3 *Exch.* 375; *Lynn v. Bruce*, 2 *H. Bl.* 317; *Lyth v. Ault*, 7 *Exch.* 664; *Jones v. Bullett*, 2 *Litt.* 49; *Blinn v. Chester*, 5 *Day*, 359; 2 *Parsons on Contracts*, 5th Ed. 619, note z, and authorities there cited; *Andrew v. Boughey*, *Dyer*, 75 a; *Pinnell's Case*, 5 *Rep.* 117; *Sibree v. Tripp*, 5 *M. & W.* 23, 35; *Brooks v. White*, 2 *Met.* 285, 286; *Jones v. Bullett*, 2 *Litt.* 49; *Douglas v. White*, 3 *Barb. Ch.* 621; *Blinn v. Chester*, 5 *Day*, 359; *Eaton v. Lincoln*, 13 *Mass.* 424; *Smith v. Brown*, 3 *Hawks*, 580; *Musgrave v. Gibbs*, 1 *Dal.* 216; *Comyn's Dig.* Accord, B; *Brooks v. White*, 2 *Met.* 283; *Henderson v. Moore*, 5 *Cranch*, 11; *Northington v. Higby*, 3 *Bing. & C.* 454; *Sibree v. Tripp*, 15 *M. & W.* 23; *Jones v. Perkins*, 29 *Miss.* (7 *Cush.*) 139; *Christie v. Craige*, 20 *Penn.* 430; *Grocers' Bank of New York v. Fitch*, 1 *Thomp. & C.* 651, 654, affirmed in 58 *N. Y.* 623. The referee and the court below fell into an error, because they did not make the distinction that the agreement to manufacture the goods,—that is, to manufacture goods at a fixed price, and the services of the defendant Heim, in manufacturing and delivering them,—constituted a new consideration. The agreement is enforceable as an equitable satisfaction (*Scott v. Frink*, 53 *Barb.* 533, 543; *Kelly v. Dee*, 2 *Thomp. & C.* 286).

II. There were other features of the accord. Plaintiff received the goods, and take his conduct, and his



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receipt of the invoices with each delivery, and the court must be convinced that the allegation of overcharge is entirely insincere, and was an afterthought to furnish him a pretense or plausible but unfounded excuse for refusing to satisfy the judgment. Even if there had been an overcharge, it would have no legal effect, because plaintiff has received the goods and has his pay for them. Kromer waived a tender by refusal to receive the belt clasps and an assignment of the patent (*Holmes v. Holmes*, 5 *Seld.* 525; *Reay v. White*, 3 *Tyrwh.* 596; S. C., 1 *C. & M.* 748). The plaintiff and his agent admit that the patent and assets are worthless; therefore the judgment is satisfied independently of the patent, and the agreement has been fully performed (See authorities and note to *Cumber v. Wane*, 1 *Smith's Leading Cases*, 7th Ed. p. 598, citing *Sibree v. Tripp*, 15 *M. & W.* 23). The maxim, "*Ne minimis curat lex*," applies.

III. It is insisted that the proposal signed by the plaintiff through his attorney, containing a written statement of the terms of a proposed purchase of personal property, which property has been delivered to, and possession of it has been taken by the plaintiff, is an acceptance of, and acquiescence in the terms of the proposal of the plaintiff to receive it, and that would be especially the case where both parties have written letters ordering compliance therewith and the acceptance of goods in performance of the contract pursuant to such orders under the contract, make it a valid contract (*Dent v. North American Steamship Co.*, 49 *N. Y.* 390; *Osborn v. Gantz*, 60 *Id.* 540; *Gaylor Manufacturing Co. v. Allen*, 53 *Id.* 515; *Fellows v. Strong*, 24 *Wend.* 278)

IV. Kromer's agreement is a release (*Willis v. De Castro*, 4 *C. B. N. S.* 211; *Hodges v. Smith*, 1 *Term Rep.* 446; *Greenbaugh v. McClelland*, 30 *L. J. Q. B.* 15; *Smith v. Mapleback*, 8 *Term Rep.*).

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V. If Kromer's position is correct, that the belt clasps and patents are worthless, *i. e.*, worth nothing, then the judgment is fully paid, as he made a contract for and upon a good consideration. Heim accepted it, and it is valid as a contract (*Story v. Salomon*, Ct. App. MSS.), and he performed it, and the judgment is paid. Otherwise, Heim has paid all that he is to pay before Kromer agreed to buy the belt clasps and patent for \$1,000, in full satisfaction of the balance of the judgment. Until all except the \$1,000 was paid the agreement was a dependent one, and as soon as all except \$1,000 was paid, it became and was a substituted agreement, and either party could sue to enforce it, and it operated as a good executed accord and satisfaction,—*i. e.*, Kromer had an absolute right to the belt clasps and patent, and Heim to a satisfaction (*Good v. Cheeseman*, 2 *Barn. & A.* 335; *Bailey v. Homan*, 3 *Bing. N. C.* 915; *Evans v. Powis*, 1 *Exch.* 601; *Curlewis v. Clark*, 3 *Id.* 375; *Glockton v. Hall*, 16 *Q. B.* 1039, cited in *Smith L. Cas.* 7th Ed. 601 n).

*J. W. Feeter*, attorney, and of counsel for respondent, urged:—I. The stipulation signed by plaintiff's attorney alone, on July 26, 1876, is no contract—is no agreement. (a) It is void for want of consideration (1 *Pars. on Con.* 427). (b) It is void for want of mutuality. No action for a breach of that document could be sustained by either party. The promise of each must be concurrent and obligatory at the same time to render either binding, and should be so stated in the declaration. It is *nudum pactum* (*Utica & Syracuse R. R. Co. v. Brinckerhoff*, 21 *Wend.* 139, by NELSON, J.; *De Zeny v. Bailey*, 9 *Id.* 336, by NELSON, J.). That document is merely a privilege given to defendant wholly without consideration, giving defendant time to pay the judgment, and to pay the principal portion thereof in merchandise; and

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Respondent's points.

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when reduced to \$1,000 to throw that off, and take said assignment, which privilege was terminable at will by plaintiff. Defendant never executed or signed the document; was never bound to perform it; never agreed to do anything under it. As defendant was not bound, plaintiff was not (21 *Wend.* 139, above cited), further than—plaintiff not having returned the goods which he allowed defendant to deliver, plaintiff is bound to credit defendant with the amount at prices defendant charged, although said prices were in excess of J. B. Hoyt's, or New York rates at cash sales, on the judgment. When satisfied that defendant is not acting in good faith, and has charged from fifteen to twenty per cent. more more than New York rates for cash sales, plaintiff is under no obligation to submit to the fraud of allowing defendant \$577.78 more than the \$1,000 he promised to throw off.

II. The defendant is bound only to pay the judgment entered by plaintiff in full, in money, \$4,334.08. The court adjudicated that, June 24, 1876. (a) Plaintiff had waited six years, since 1870, to get that judgment, and wanted no new, or other obligation from defendant,—and took none, and made none. (b) Release not under seal, and without consideration, is void (2 *Johns.* 438; 2 *Cow.* 122; *Seymour v. Minturn*, 17 *Johns.* 169; *Mitchel v. Hawley*, 4 *Den.* 414). (c) The document is merely a privilege in which plaintiff promised, on certain conditions and without consideration, to take a less sum than the amount due to him. Plaintiff has not accepted the performance. Plaintiff has distinctly refused to accept defendant's pretended performance.

III. Said document being no contract, the transaction or case does not constitute an accord and satisfaction. (a) Payment of a less sum than that due does not operate as an accord and satisfaction (2 *Johns.* 448; *Seymour v. Minturn*, 17 *Id.* 169). (b) Perform-

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Opinion of the Court, by SPEIR, J.

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ance has not been accepted by plaintiff as accord and satisfaction. Tender of performance is not sufficient; there is no accord unless performance is accepted (*Tilton v. Alcott*, 16 *Barb.* 598, and many cases cited). (c) Plea of accord and satisfaction is not supported by proof of a tender made to plaintiff's attorney, who declined to accept it as satisfaction, for one of the essentials, acceptance, is wanting (*Noe v. Christie*, 51 *N. Y.* 270; *Hammond v. Christie*, 5 *Robt.* 160; *Burge v. Koop*, *Id.* 1; *Geary v. Page*, 9 *Bosw.* 300; *Mitchel v. Hawley*, 4 *Den.* 414).

BY THE COURT.—SPEIR, J.—By the terms of the stipulation the price of the merchandise to be delivered was provided for. It was delivered at certain intervals of time, with the prices named and fixed at the several times of delivery. The plaintiff raises the objection that some of the merchandise had been invoiced to him at too high prices; that it was provided in the stipulation that the merchandise ordered by plaintiff must be furnished by the defendant, on as favorable terms as would be allowed by New York firms at New York rates for cash sales, and of good quality; that the overcharges in defendant's bill amount to \$577.08. The objection comes too late. All the merchandise had been delivered with the bills and prices annexed, and the goods delivered were not returned.

When the amount due under the stipulation had been reduced to \$967.58, the defendant made and tendered to the plaintiff an assignment of the patent, and of the assets of the business, which the plaintiff declined to accept. Had he accepted the assignment, such acceptance, with the previous cash payments and payments in merchandise under the stipulation, would have been a full and complete accord, payment and satisfaction of said judgment.

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Opinion of the Court, by SEYMOUR, J.

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The difficulty in sustaining defendant's motion to set aside the execution, and to compel a satisfaction of the judgment, is that no consideration appears in the stipulation. It is a mere privilege, for which the defendant paid nothing, and came under no obligation to do anything whatever. It was entirely optional with him whether he would avail himself of making any of the payments, or executing the assignment. The judgment was good in the hands of the plaintiff, and could be presently executed. He gave time to the defendant by paying down \$250 in cash, and at intervals in cash and merchandise, until the whole sum should be reduced to \$1,000. It was, in fact, reduced by the payments to the sum of \$967.08, and an assignment of the patent, &c., was tendered, but not accepted.

It is well settled that an accord, executory, with tender of performance, is no bar to an action. There are no facts to show that there was an accord and satisfaction of the plaintiff's judgment, and as the whole defense rested upon that, it was incumbent on the defendant to establish it (*Brooklyn Bank v. De Grauw*, 23 *Wend.* 342; *Noe v. Christie*, 51 *N. Y.* 270). In this last case it was held that a tender was not equivalent to execution. The plaintiff agreed to accept and did accept some cash and some merchandise in lieu of cash, and so far the accord was executed, but the tender of the assignment of the patent and assets is not equivalent to execution, it not having been accepted.

The defendant's counsel relies upon a class of cases where the courts have regarded the new agreement not as an accord but as a substituted agreement, and have held it to be a good defense though not performed at the time of the suit.

Among other cases he relies upon the case of *Good v. Cheeseman* (2 *B. & Adol.* 335). Even this case has

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been subsequently held as not affecting the rule that an accord executory must be executed, to constitute a defense (See decision of TINDAL, Ch. J., in *Bailey v. Homan*, 3 *Bing. N. C.* 915). It would seem that even in such cases the new agreement will not be held to have been substituted unless the creditor has an immediate right of action upon it. The plaintiff here had no such right arising out of any direct or implied promise of the defendant; nor was there any concurrent promise which would be binding upon either.

The order appealed from should be affirmed with costs.

SANFORD, J., concurred.

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SHEPHERD F. KNAPP, RECEIVER, &CO., OF THE  
BOWLING GREEN SAVINGS BANK, PLAINTIFF  
AND RESPONDENT, v. WALTER ROCHE, DE-  
FENDANT AND APPELLANT.

**I. Corporation, savings bank.**

1. PROHIBITION IN CHARTER against investing money deposited, except upon certain specified securities, and against the president, vice-president, any trustees, officers or servants directly or indirectly borrowing the funds of the corporation, its deposits, or in any manner using the same or any part thereof, except to pay necessary current expenses under the direction of board of trustees.

(a) ACTIONS BASED ON THE STATUTE FOR THE  
RECOVERY OF MONEY INVESTED OR USED IN  
VIOLATION OF THE PROHIBITION.

1. CONSTITUTIVE FACTS OF.

- (a) *What are:* that there was a violation; that defendant is one of the parties falling within the

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purview of the prohibition; and that he authorized, or was a party to, the violation.

(b) *What are not:* that the money invested or used has not been repaid; that a demand has been made on the borrower; that the money has been lost, either through the inadequacy of the security or the insolvency of the borrower or otherwise.

(b) VIOLATION OF PROHIBITION, WHAT CONSTITUTES.

1. Loaning money on promissory notes, cashing checks, or permitting a depositor to overdraw his account.

(c) RATIFICATION OF.

1. *What not sufficient to raise a liability as to one not originally a party to the violation.*

(a) In reply to a statement made by the bookkeeper to defendant "that the bank had to make up its bank account and those checks" (referring to checks given for an unauthorized loan to C.), "must be got out of the way," "and he would make it a call loan to the defendant (the vice-president and a trustee), the defendant said "Do whatever you please. Charge it to C."

HELD,

not a ratification whereby the defendant could be made liable on account of the loan.

Before SPEIR, SANFORD and FREEDMAN, JJ.

*Decided November 4, 1878.*

This is an appeal from a judgment against the defendant entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the judge's minutes.

The action was brought to recover the amount of certain moneys of the insolvent Bowling Green Savings Bank, which the defendant, acting as one of its officers and trustees, had invested, loaned and used in violation of the express provisions of its act of incorporation, and which had never been repaid or collected.

There was no allegation in the complaint, and no

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Appellant's points.

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proof on the trial, that any demand was ever made either upon the railroad company or Colburn (in the opinion referred to), or that they refused or were unable to pay, or that the alleged loans or overdrafts had not been repaid and were uncollected.

The facts pertaining to the questions discussed sufficiently appear in the opinion.

*John T. McGowan*, attorney, and of counsel for appellant, among other things urged:—I. While there can be no doubt that an action may be sustained against an officer of a bank for making loans of its funds in a manner not authorized by law, yet such an action can be maintained only by strict proof that the corporate funds or property have been lost and wasted, and the corporation has suffered actual loss. Though the prohibition in the act of incorporation may be held to confer a remedy by action in favor of the party injured, yet it is no greater in extent than that which would exist in the absence of the prohibitory clause (*Potter on Stat.* 160; *Almy v. Harris*, 5 *Johns.* 175). At common law, no action would be maintainable in the absence of proof of loss arising from the wrongful act (*Angell & Ames on Corp.* §§ 312, 314).

II. In the present case, there was no evidence whatever of the taking or loaning of any money, or indeed of any tangible thing, and therefore no support for any part of the plaintiff's claim. 1. There was no evidence whatever that the defendant ever had in his possession, actual or constructive, any money belonging to the Bowling Green Savings Bank. 2. The evidence proved, and only proved, that the secretary of the bank, who had supervision of the business of the bank, and charge and control of the receiving and paying teller thereof, had permitted the Avenue C Railroad Company and Daniel K. Colburn, two of its depositors and dealers, to overdraw their accounts with the bank, and thereafter,



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Opinion of the Court, by SPEIR, J.

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at various times, credits were given to both on the books of the bank against which they drew their checks, respectively. The transaction consisted in the making of entries in the books of the bank giving a credit to each of the dealers above named, and they were thereby authorized to draw against the amounts to their credit respectively in the bank. 3. True, the effect of these transactions was to cause the Bowling Green Savings Bank to pay the checks of the railroad company and Colburn, drawn against their respective accounts in said bank, but the testimony nowhere shows that the overdrafts, if any, were not paid to the bank before the appointment of the plaintiff as receiver, or to the plaintiff subsequent to his appointment. 4. There is no allegation or proof that any demand was ever made either upon the railroad company or Colburn; that they refused or were unable to pay, or that the alleged loans or overdrafts have not been repaid, and were uncollected. 5. Conceding that the alleged loans or overdrafts were made in violation of the restrictive clause in section 4 of the act, in neither that nor section 6 is any pecuniary liability imposed on the offending trustee or trustees.

*Devlin, Miller & Trull*, attorneys, and *John E. Devlin*, of counsel, for respondent.

BY THE COURT.—SPEIR, J.—Section 6 of the act specifically defines the business and object of this savings bank, which are to receive deposits of moneys, and to invest them or loan the same on certain specified State, United States, city or county securities of this State, or in such other manner as is authorized by the act of incorporation, for the use, interest and advantage of the depositors. It also provides that no president, vice-president, trustee, officer or servant of the corporation, shall directly or indirectly borrow its

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Opinion of the Court, by SEER, J.

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funds or its deposits, or in any manner use the same, "except to pay necessary expenses." It further provides "that no money deposited in the said savings institution shall be invested except in the securities and stocks mentioned in the section, or on bonds and mortgages of unincumbered real estate, worth at least double the amount of the loans to be secured thereby."

It clearly appears that the defendant loaned, by way of temporary investments, the funds of the bank to the Avenue C Railroad Company, and to one Colburn, partly upon promissory notes, and partly without any evidence of debt whatever, but in no instance upon any of the securities, stocks, bonds or mortgages permitted by the act of incorporation. The testimony is uncontradicted that Smith, the president, the defendant, the vice-president, and the bookkeeper, Selmes, had a full and clear understanding during the whole time that these overdrafts and loans to the Avenue C Railroad Company were to be protected and taken care of at all events. I am unable to see that, so far as the verdict includes the balance of these overdrafts and loans to this railroad company, that any exception can be taken to it. The evidence in the case fully sustains the findings of the jury in this particular.

The case discloses that there was an account kept by Mr. Selmes, the bookkeeper, of the loans made to Colburn, and that the whole sum amounted to \$99,860.74, and that there was paid on account thereof, which had been credited to Colburn, an amount leaving a balance, as due from him, the sum of \$15,570.28. I am of opinion that the whole of this sum cannot be charged to the defendant. In other words, the sum of \$5,500, included in this balance, was borrowed by Colburn from Selmes, the bookkeeper, on three several distinct checks drawn by friends of Colburn, payable to his order, and indorsed by him about June 21, 1870;

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Opinion of the Court, by SPEIR, J.

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without the knowledge of the defendant, and when he was on his way to Europe. The checks were cashed by Selmes, after advising with Smith, the president, with the money of the savings bank, and were put into the drawer and counted as cash. These checks remained in the drawer for about six months, continued to be counted as cash, and when it became necessary for an account to be made up at the end of the year to show to the superintendent, it was deemed important to get these checks out of the way, as it would not answer to call them money, especially as the president and the bookkeeper had tried their best to collect them from Colburn and had failed. It was then determined to make this a call loan, and put it into defendant's account, which was done on December 31, 1870. The only proof that the defendant had anything to do with the loan to Colburn relied upon by the plaintiff's counsel, and which is all that appears in the case, relates to a conversation between Selmes and defendant, as testified to by the former. He says he told defendant—as I understand his testimony—that the bank had to make up its bank account, and those checks must be got out of the way, and he had, or would make it a call loan by defendant. The reply was, "Do whatever you please. Charge it to Colburn." This was not a ratification of the original loan, which was made by the witness Selmes, and for which the defendant could be made liable. Selmes does not appear to have had any authority from Roche to loan the money and count the security which he took as cash in his money drawer. Ratification is the subsequent adoption of certain acts, which is equivalent to a prior authority. The witness Selmes had been before particularly examined by plaintiff's counsel as to what he knew about the loans to Colburn, and his answer was, "He, defendant, spoke to me about all these, except this \$5,500. That has to be explained, you

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Statement of the Case.

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know.” It is also to be remembered that this witness stated “that, after the overdrafts had been accumulating, Mr. Smith, Mr. Roche and myself, had a perfect understanding all the time as to these overdrafts and loans to the Avenue C Railroad Company, that they were to be taken care of and protected—that was the first thing to be done, and we were to make the explanations afterwards.” This arrangement was not extended to the Colburn loans.

The judgment and order must be reversed and a new trial had, with costs to appellant to abide the event, unless the plaintiff deduct from the verdict the sum of \$5,500, with interest from December 31, 1870, in which case the judgment and order must be affirmed without costs on this appeal.

FREEDMAN, J., concurred.

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DAVID McMASTER, PLAINTIFF AND RESPONDENT,  
v. MARCUS KOHNER, DEFENDANT AND AP-  
PELLANT.

I. *Agreement.*

1. MODIFICATION, WHEN CONSIDERATION FOR NECESSARY.

(a) *Rent, reduction of.*

1. An agreement to reduce the rent reserved by a lease for the balance of the demised term thereafter to ensue requires a new consideration.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

The facts sufficiently appear in the opinion.

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Opinion of the Court, by SPEIR, J.

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*J. H. Southworth*, attorney, and *H. O. Southworth*, of counsel, for appellant.—The decision at the trial was erroneous. 1. A contract in writing may be varied by parol, the original contract furnishing sufficient consideration for the modification (38 *N. Y.* 225, 227, *HUNT*, Ch. J.; 20 *Barb.* 42). Original contract in writing, modified by parol afterward. “Held also it was competent for the parties by a subsequent parol contract, to extend the time for the performance of the original agreement, and this without any new consideration.” The time for performance in this last case was enlarged by parol, and held well (20 *Barb.* 64. See 5 *Cow.* 506; 8 *Johns.* 528; 1 *Barb.* 327; 15 *Johns.* 200; 7 *Cow.* 48, 50; 12 *Barb.* 366). The case in 38 *N. Y.* would seem to be decisive of the one at bar in defendant’s favor.

*W. McDermott*, attorney, and of counsel for respondent.—A promise by parol made subsequently to the execution of the lease, needs a new and sufficient consideration to uphold it (*Walker v. Gilbert*, 2 *Robt.* 214. See also *Van Allen v. Jones*, 10 *Bosw.* 369; *Coe v. Harly*, *Daily Register*, March 4, 1878, Ct. of App.).

BY THE COURT.—SPEIR, J.—The action was brought to recover a balance of \$764.88 due to the plaintiff for rent on a lease dated October 19, 1874. By the terms of the lease the defendant was to pay the sum of \$1,550 per annum, payable monthly in advance, for two years and six months from November 1, 1874.

The defendant gave evidence tending to show that when the lease was running, and after the January term of 1876 had commenced, the plaintiff agreed to accept \$100 per month thereafter, and that defendant paid such sum until June, 1876, when plaintiff agreed to accept for the balance of said term \$80 per month rent until the end of the term, and that defendant

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Statement of the Case.

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directed a man who boarded with him to pay plaintiff that amount, which he did pay until the termination of the lease. The court ordered a verdict for the plaintiff—for the reason that the agreement claimed by the defendant was without consideration and void. This is too plain for discussion.

The judgment must be affirmed with costs.

FREEDMAN, J., concurred.

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JACOB W. FEETER, PLAINTIFF AND RESPONDENT,  
v. MARGARET WEBER, EXECUTOR, &C., DE-  
FENDANT AND APPELLANT.

I. CONTRACTS.

1. *Promissory note.*

(a) CONSIDERATION, WHAT SUFFICIENT.

The *settlement* of a litigation is a sufficient consideration for notes given in pursuance of, and to effect, the settlement.

II. *Settlement.*

1. ESTOPPEL BY.

When parties to a litigation come to a settlement thereof, and one, pursuant to the settlement, and to carry it into effect, gives to the other his promissory notes (such other complying with the terms of settlement on his part), he cannot, in an action on the notes, set up that his adversary in the litigation so settled had no legal cause of action against him, without showing fraudulent concealment of material facts which were not within his knowledge when he gave the notes.

(a) *Especially* is this the case where the defendant in an action on the notes himself proves the settlement and compromise.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

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Statement of the Case.

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The defendant appeals from a judgment in favor of the plaintiff on a verdict rendered by the jury, under the direction of the court, for \$2,416.94, entered December 12, 1877, being the amount of four promissory notes, with interest, dated September 2, 1874, for \$500 each.

It appeared that Mrs. Mary A. L. Weber, the widow and executrix of Albert Weber, had in the lifetime of Charles F. Weber commenced an action against him for the recovery of certain goods, chattels, and credits, claimed to belong to the estate of Albert Weber, and had also taken certain proceedings before the surrogate. The suit and proceeding were settled between the parties. The terms were that Charles F. Weber should give to Mary A. L. Weber the promissory notes in question, and Mary A. L. Weber should assign all claim to the estate of Albert Weber, deceased, her husband, to Margaret Weber, wife of Charles F. Weber, and discontinue the above mentioned suits, and stipulate that she would bring no other for the same cause of action or any part thereof, or for any goods, chattels, money, or credit claimed to have been taken by the defendant therein, and that she should surrender to Charles F. Weber, all the books, papers, receipts, vouchers, or memoranda in her possession belonging, or at any time in the possession of Albert Weber, deceased, or that came into her possession as executrix, or that have been in her possession at any time since the decease of Albert Weber.

Each party fulfilled the terms to be performed by them respectively.

Thereafter Charles F. Weber died, and letters testamentary were issued to defendant as executrix of his will.

The notes were assigned to the plaintiff.

Defendant's counsel admitted all the material alle-

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Appellant's points.

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gations in the complaint, but insisted that there was no consideration for the notes, because the estate of Charles F. Weber had no cause of action whereon to found the action and proceedings compromised, and that Mary A. L. Weber was chargeable with knowledge of it.

There was no re-assignment or offer to re-assign that which had been assigned to Margaret, nor any offer to annul the stipulation for the discontinuance of the aforesaid action, nor any return, or offer to return the articles, &c., which had been surrendered to Charles F. Weber.

The defendant held the affirmative of the issues on the trial.

*Sigismund Kaufmann*, attorney, and *Lewis Sanders*, of counsel, for appellant, among other points urged :—I. To justify the direction of verdict in favor of either party the evidence must not only be undisputed, but there must be no evidence in the case which would warrant a jury in drawing contrary inferences. If there are any inferences to be drawn, the case must be left to the jury. "The evidence tended to maintain the issue which the jury were to try; whether weak or strong, it was their right to pass upon it" (*Hickman v. Jones*, 9 *Wall.* 201; *Barney v. Schneider*, *Id.*). "Nor is it always enough that the evidence be undisputed, if it be of a circumstantial character, for then there is often a conclusion to be drawn by the jury" (*Rich v. Rich*, 17 *Wen.* 676). When a question of fraud arises on the trial, the court cannot withhold such question from the jury (*Upton v. Bedlow*, 42 *How.* 121). It was for them (the jury) to draw inferences from the conduct of the parties, and upon an examination of all the facts to declare what that conduct was designed to express (*Lockwood v. Thorn*, 18 *N. Y.* 291).



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Respondent's points.

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II. The answer denies that there was any consideration whatsoever paid for the notes. The notes were given in compromise of a suit in the superior court and surrogate's proceedings; the court declined to try the question whether or not these claims were *bona fide* or not, and excluded nearly all the evidence offered to show the claims to be totally unfounded. Upon all the authorities this was clearly error. If the estate of Albert Weber had no claim against his father, Charles F. Weber, then a bringing of a suit did not make it any better; it made it worse, being in the nature of a blackmail claim, and its discontinuance would not be any consideration; as plaintiff, by discontinuing a suit without any foundation, got rid of the certainty of paying costs. This point was directly raised and decided by TINDAL, C. J., and CRESSWELL, J., in *Wade v. Simeon* (3 D. & L. 596), where the declaration stated that the sums sued for had been promised by defendant during the pendency of a former suit, and in consideration of its being discontinued, which was done. The defense was that the plaintiff never had any cause of action, and that he knew it. To which defense plaintiff demurred. The demurrer was sustained (See also *Cook v. Wright*, 1 B. & S. 539, 570; *Tooley v. Windham*, Cro. Eliz. 206). *Longridge v. Danville* (5 Barn. & Ald. 122), suit on compromise of claim for damages against the owners of the ship *Carolina*. "BAYLEY, J. If it had appeared in this case that the owners of the *Carolina* could not have been liable at all, I agree that the consideration for the promise would have failed."

*J. W. Feeter*, attorney, and of counsel, for respondent, urged:—I. The notes in this action, having been given in settlement of former actions, are founded on good consideration, and the court will not look behind the compromise,—it is not competent to show that the

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first suit could not have been maintained (BRONSON, J., *Stewart v. Ahrenfeldt*, 4 *Denio*, 189; *Farmers' Bank of Amsterdam v. Blair*, 44 *Barb.* 641; *Russell v. Cook*, 3 *Hill*, 504; *Seaman v. Seaman*, 12 *Wend.* 381).

II. The notes in suit given by defendant's testator to Mary A. L. Weber, and the consent given by Mary to discontinue the actions brought by her against said Charles F. Weber, and the assignment by Mary to defendant of her interest in the estate of Albert, and the general release to Charles F. Weber, each was the consideration for the other, and constitute a written agreement. The defendant is estopped from avoiding said agreement, or the payment of said notes, without having restored or having offered to restore to plaintiff's assignor or plaintiff whatever the defendant or her testator received for said notes (*Ely v. Kilburn*, 5 *Den.* 514; 2 *Abb. Dig.* 270, § 1395; *Mumford v. Am. Life Ins. Co.*, 4 *N. Y.* 482, 483; *Hogan v. Weyer*, 5 *Hill*, 389; 5 *Barb.* 319; 13 *Id.* 641; 2 *Story Eq.* §§ 693, 694; *Willard's Equity* (Potter's ed.) 303).

BY THE COURT.—SPEIR, J.—The main defense interposed on the trial was that the notes were given and executed without any consideration. It appears that a suit was pending in this court, brought by Mary A. L. Weber, executrix of Albert Weber, deceased, against Charles F. Weber, the maker of the notes, for the recovery of certain goods, chattels and money supposed to belong to the estate of Albert Weber, deceased. That at the same time, certain proceedings were pending in the surrogate's court in the matter of the estate of Albert Weber, deceased, in which she as executrix and legatee claimed as owner all the estate and assets belonging to him in his lifetime. These proceedings in the surrogate's court and the suit in the superior court were compromised and discontinued on September 2, and the notes in suit are of the same date and

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Statement of the Case.

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were given in consideration of the settlement of the suit and the proceedings in the two courts. The defendant's counsel furnished the evidence on the trial of the discontinuance and settlement in both cases. He then offered to show that Mary A. L. Weber, executrix, &c., had no legal cause of action against Charles F. Weber, the defendant in said suit or proceedings. The learned judge, very properly, we think, declined to try that issue. The settlement and compromise rested upon a good consideration. The counsel did not offer proof of any fraudulent concealment of material facts, which were not within the knowledge of his client, who made the notes ; he was not therefore in a position to defeat a recovery upon his promise to pay them. The defendant having himself furnished the evidence of settlement and compromise was estopped from setting up that the proceedings in the courts had no foundation in law.

The claim that Charles F. Weber was under duress at the time he executed the notes and delivered them to Mary A. L. Weber, was clearly shown to be destitute of any foundation by defendant's own witness. Further notice of the point is unnecessary.

The judgment must be affirmed with costs.

FREEDMAN, J., concurred.

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MORRIS K. JESSUP, AND OTHERS, PLAINTIFFS, v.  
ANDREW CARNEGIE, AND OTHERS, DEFEND-  
ANTS.

I. CORPORATION.

1. *Pre-requisites to a legal corporate existence.*

(a) NON-COMPLIANCE WITH, EFFECT OF.

1. See PARTNERSHIP, *infra*.

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Statement of the Case.

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2. *De facto by user.*

(a) DOCTRINES RELATING TO, WHEN NOT APPLICABLE.

1. Not applicable where a corporation is sought to be formed under the provisions of a general law.

3. *Iowa, corporations in State of.*

(a) General statutes existing in 1871, relating to the formation of corporations other than railroad corporation.

1. PRE-REQUISITES TO A LEGAL CORPORATE EXISTENCE.

1. Recording of articles of incorporation in the office of the recorder of deeds of the county where the principal place of business is to be, in a proper book kept therefor, and within three months after such recording, filing in the office of the secretary of state a copy of the articles, and publishing a certain prescribed notice for four weeks in succession in some newspaper as convenient as practicable to the principal place of business.

II. STATUTES.—CONSTRUCTION OF.

1. MANDATORY, WHAT ARE.

1. *Negative expressions* will impress a mandatory character on a statute.
2. *Imposition of a duty* and giving the means of performing it will have a like effect.

III. PARTNERSHIP RESULTING BY OPERATION OF LAW.

1. CORPORATION.—Body assuming to be without legal corporate existence, *associates in forming, and stockholders in,* the proposed company *are liable as copartners* upon contracts made in the name adopted as its corporate name.

1. This although the parties dealing with the proposed company believed it to be a corporation, and dealt with it as such.
2. This although the associates and stockholders did not intend to become copartners and liable as such.

IV. COMITY OF STATES.

1. Statute law of one State to be applied in another.

(a) *Existing law at the time of contract made to be applied.*

The rights, liabilities, and obligations of parties to a contract made and to be performed in this State, the parties on one side being all citizens of New York, and on the other not citizens of Iowa, so far as affected by the statute laws of Iowa, must be determined according to the *interpretation* and construction of the statute as expounded by the courts of Iowa at the time of the making of the contract.

- (a) *This although the then exposition has been by subsequent decision reversed.*

V. CONSTITUTIONAL LAW.

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Statement of the Case.

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1. *Impairing obligation of contracts.*

(a) BY JUDICIAL DECISIONS, cannot be.

1. Can no more be impaired by subsequent judicial decisions on the construction of a statute, than by subsequent legislation.

(b) REMEDY, IMPAIRING OF WHEN IMPAIRS THE OBLIGATION.

1. A statute which so affects the remedy existing at the time the contract was entered into as to *substantially impair and lessen the value of the contract* impairs the obligation of the contract, and is forbidden by the constitution, and is therefore void.

## VI. APPLICATION OF ABOVE PRINCIPLES.

1. *The Davenport Railway Construction Company.*

HELD,

that as to the plaintiffs in this action it must be held:

1. That it is not a railroad corporation.
2. That it has not complied with the pre-requisites to a legal corporate existence.
3. That the associates in its formation, and those who became interested therein, are liable as copartners upon obligations made in the name adopted for the proposed corporation.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

This action was brought against the defendants as copartners on a number of promissory notes made under the name and designation of "The Davenport Railway Construction Company."

In addition to the statutory provisions referred to in the opinion, there were read in evidence various provisions of the statutes of Iowa, respecting remedies against corporations and stockholders referred to in the points.

The cause was tried before the court and a jury, and a verdict for plaintiff was directed.

The exceptions were ordered to be heard at the general term in the first instance.

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Defendant's points.

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*Lewis Sanders*, attorney, and of counsel for defendants, Carnegie, Smith, McCandless and Preston.—I. *a.* Stockholder not liable under Iowa statute. The precise question which is attempted to be raised here has been definitively decided twice by the highest court of Iowa (*First National Bank v. Davies*, 43 *Iowa*, 435), where the court held that a failure to file a copy of the articles of incorporation in the secretary of state's office was not a failure to comply substantially with requisitions of publicity and organization, required by the statute. *b.* The decision by the court of last resort of a State upon the statutes of its own State is conclusive on the courts of other States. It becomes a part of the statute law (*Elmendorf v. Taylor*, 10 *Wheat.* 159, 160; *Shelby v. Guy*, 11 *Id.* 367; *Arguello v. U. S.*, 18 *How. Pr.* 539; *Suydam v. Williamson*, 24 *How. U. S.* 427; *Hoyt v. Thompson*, 3 *Sandf.* 421; *Hoyt v. Sheldon*, 3 *Bosw.* 302).

II. 1. Failure to file articles in secretary of state's office is a question for the State only. 2. The requirement of the statute is simply to duplicate proof (*Tarbell v. Amos*, 24 *Ill.* 48; *Cross v. Pinckneyville Mill Co.*, 17 *Id.* 56; *Mokelmume Hill Mining Co. v. Woodbury*, 14 *Cal.* 427; *Baker v. Backus*, 32 *Ill.* 97).

III. The Iowa statute forbids this suit. The foregoing authorities under point II. illustrate the policy of the law, and show the principle to be uniformly approved. In addition to the policy of the law, as expounded by the courts, we have, under the Iowa statute, a positive inhibition. "Sec. 1180. Persons acting as a corporation, under the provisions of this chapter, will be presumed to be legally incorporated, until the contrary is shown; and no such franchise shall be declared actually null or forfeited, except in a regular proceeding brought for that purpose."

IV. The general policy of the law is the same

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 Defendant's points.
 

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(Buffalo and Albany Railroad Co. v. Cary, 26 N. Y. 77; Eaton v. Aspinwall, 19 Id. 121, 122). Defect in organization is a question of law, and it is for the State alone to take steps to dissolve such corporation (Doyle v. Peerless Petroleum Co., 44 Barb. 244; Trustees of Vernon v. Hills, 6 Cowen, 26, 27; The Eagle Works v. Churchill, 2 Bosw. 171; Charles River Bridge v. Warren Bridge, 7 Pick. 371; Wight v. Shelby R. R. Co., 16 B. Monroe (Ky.) 7; Searsbury Turnpike Co. v. Cutler, 6 Vt. 324). That condition precedent to a legal organization of corporation cannot be collaterally questioned (State v. Carr, 5 N. H. 370; President, &c., Kishacoquillas and Cent. T. R. Co. v. McConaby, 16 Serg. & Rawle, 145; Canal Co. v. Railroad Co., 4 Gill & J. 4, 107; 1 Edw. 84-110; Chamberlain v. Painesville and Hudson R. R. Co., 15 Ohio, 250).

V. Proceedings must be had in Iowa. The proceeding against the corporation must be had in the State granting the charter (Persse & Brooks' Paper Works Co. v. Willett, 19 Abb. Pr. 433).

VI. Proof of corporation. "Evidence of user sufficient" (Eaton v. Aspinwall, 10 N. Y. 121; Williams v. Bank of Michigan, 7 Wend. 553; McFarlan v. Triton Insurance Co., 4 Denio, 397; Rindell v. Fray, 32 Cal. 361; Dannebroke Mining Co. v. Allment, 26 Cal. 288; President & Trustees v. Thompson, 20 Ill. 200; Utica Ins. Co. v. Tilman, 1 Wend. 555; Gaines v. Bank of Miss., 7 English (Ark.) 769; Bank of Manchester v. Allen, 11 Vt. 302; 3 Wend. 296; Caryl v. McErath, 3 Sandf. 178-179; Spring Valley Water Works, San Francisco, 22 Cal. 440, reviewing all the cases). Every presumption indulged in favor of the legal existence of a corporation after it has gone into operation (Dunning v. New Albany and Salem R. R., 2 Ind. 457; 1 Greenl. Ev. 65). Exemplified copy of charter and evidence of user under it suf-

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Defendant's points.

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ficient proof of incorporation (*Utica Ins. Co. v. Tilman*, 1 *Wend.* 555). *Searsbury Turnpike Co. v. Cutler* (6 *Vt.* 322), dispenses with proof of record of organization; parol proof of incorporation under indictment for counterfeiting is admitted (*S. C., Id.* 323). Books of a corporation are competent evidence for the purpose of showing the acts and proceedings of the corporation, and that it has complied with statutory requisites (*Ryder v. Alton & Sangamon R. R.*, 13 *Ill.* 523; *Highland Turnpike v. McKean*, 10 *Johns.* 154; *Owings v. Speed*, 5 *Wheat.* 420; *Wood v. Jeff. Co. Bank*, 9 *Cowen*, 194; *Gray v. Turnpike Co.*, 4 *Randolph*, 578; *Duke v. Catawba, Nov. Co.*, 10 *Ala.* 82; *Hall v. Carey*, 3 *Georgia*, 239).

VII. Stockholders improperly joined. Cause of action several. Defendants not jointly liable as stockholders (*Young v. New York and Liverpool U. S. Mail Steamship Co.*, 15 *Abb. Pr.* 75; *Aspinwall v. Torrance*, 1 *Lansing*, 384). Statutes of Iowa make the individual property of the stockholders liable; this liability is several. It does not make the stockholders liable.

VIII. Estoppel. "But defendant having undertaken to enter into a contract with the plaintiffs in their corporate name, he thereby admits them to be duly constituted a body politic and corporate, under such name" (*Dutchess Cotton Manufactory v. Davis*, 14 *Johns.* 245; *Henriques v. Dutch West India Co.*, 2 *Ld. Raym.* 1535; *Judah v. American Live Stock Ins. Co.*, 4 *Ind.* 339, and cases there cited; *Franz v. Teutonia Building Asso.*, 24 *Md.* 270; *Wood v. Coosa & Chattanooga R. R.*, 32 *Geo.* 291, 292).

VIII. There is no liability of stockholder at common law. "It is clear by common law only corporation could be sued" (*Erickson v. Nesmith*, 4 *Allen [Mass.]* 235). Without a provision in law or charter for individual liability of stockholder, the general rule is,



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Defendant's points.

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none exists (*Shaw v. Boylan*, 16 *Ind.* 386 ; *Winter v. Baker*, 50 *Barb.* 433). Dissolution of corporation does not render stockholders liable as partners (*Tarbell v. Page*, 24 *Ill.* 47 ; *Central Savings Bank v. Walker*, 66 *N. Y.* 430 ; *Wilson v. Fesson*, 12 *Ind.* 285). At common law there is no individual liability of a stockholder (*Shaw v. Boylan*, 16 *Ind.* 386 ; *Trustees of Free Schools So. Parish Andover v. Flint*, 13 *Metc. [Mass.]* 539 ; *Woodruff & Beach Iron Works Company v. Chittenden*, 4 *Bosw.* 417 ; *Andrews v. Callendar*, 13 *Pick.* 490 ; *Winter v. Baker*, 50 *Barb.* 434).

IX. This court has not jurisdiction of the subject-matter of the action. This will be apparent from an examination and comparison of the case at bar with *Lowry v. Inman*, 46 *N. Y.* 120. . . . "Whether the obligation is imposed, and the remedy given solely by the statute, or rests upon the assent of the stockholders . . . the result is the same ; the obligation, or liability, and the remedy are inseparable ; and the party interested is confined to the remedy prescribed by the act." The remedies prescribed by the Iowa statute are :—1st. A judgment against the corporation. 2nd. Execution thereon. 3rd. Demand upon the proper officer for corporate property. 4th. A return of insufficient corporate property. 5th. An action against the stockholder. 6th. Stockholders' right to a stay of proceedings at any stage of the action against himself upon pointing out corporate property. Before this action could be maintained against any stockholder in Iowa, a judgment must have been recovered against the company, execution issued, demand made, and execution returned unsatisfied. Though the contracts sued upon were made in New York, they are to be governed by the Iowa statute (*Hutchins v. New England Coal M. Co.*, 4 *Allen*, 583). When a statute creates a right and provides a remedy,

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Defendant's points.

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that alone must be followed (Smith v. Lockwood, 13 Barb. 209; Moncrief v. Ely, 19 Wend. 407; Doe v. Bridges, 1 Barn. & Ad. 859; Hillsdale v. Larned, 16 Mass. 64-69; Stafford v. Ingersol, 3 Hill, 41; Almy v. Harris, 5 Johns. 175; Renwick v. Morris, 7 Hill, 576; Erickson v. Nesmith, 4 Allen, [Mass.] 236, and cases cited). Action in Massachusetts to charge stockholder in New York corporation for corporate debts for failure of company to file annual report, &c. *Held*, "Liability of stockholder must be treated as part of the statute system of another State, incapable of execution *alieno foro* (Halsey v. McLean, 12 Allen, 443).

X. Where the statute of a foreign State provides the remedy without becoming a portion of the contract made under it, it may be repealed by the legislature at pleasure. No State interferes with the internal police of another. Nor will it enforce an obligation entered into with a view to that police, and intended to have no operation except in connection with it. No action can be maintained out of the State, where, by the law of the State authorizing the contract, it is to have effect only in a particular way, not known to the common law. It is the exclusive province of the tribunals of that State (Picheney v. Fisk, 6 Vt. 108-112). By chap. 32, *Laws of Iowa of 1876*, the proceedings of the Davenport Railway Construction Co. were validated. The liability of the stockholder for failure to file articles of incorporation in the secretary of state's office is penal, and is analogous to the penalty imposed upon trustees for not filing the annual report under the laws of this State, which has been held to be a penalty (Merchants' Bank v. Bliss, 35 N. Y. 412). The statute of limitations for penalties was enforced in Whiting Arms Co. v. Barlow, 63 Id. 57; Jones v. Barlow, 62 Id. 205). It being a penalty, the power which prescribes

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 Defendant's points.
 

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formalities to be observed in its creation is able to dispense with them (*Black River R. R. Co. v. Barnard*, 31 *Barb.* 258).

XI. By a repeal of the penalty the action falls with it (*U. S. v. Findley*, 1 *Abb. U. S.* 364; *Kimbrow v. Colgate*, 5 *Blatchf.* 229; *U. S. v. Six Fermenting Tubs*, 1 *Abb. U. S.* 268; *U. S. v. Tynen*, 11 *Wall.* 88).

XII. The company's notes were excepted to as incompetent, irrelevant, and because no foundation had been laid for them. If corporation had no corporate existence, it would not authorize holder of notes made by it to treat stockholders as partners (*Towbridge v. Scudder*, 11 *Cushing*, 86; *Fay v. Noble*, 7 *Id.* 192; and authorities cited, *supra*, VIII. and IX.). Articles of incorporation, &c., to prove agency of person making contracts as an authority from stockholder, held inadmissible (*Noble v. Fay*, 7 *Cushing*, 189). In *Cochran v. Arnold*, 58 *Penn.* 404, it was held, in an action to charge stockholders as partners doing business as a corporation under name of "Conestoga Steam Mills," for irregularity in formation, suit on notes given by C. S. M. for cotton sold by plaintiffs, *Held*—"corporate existence of a corporation *de facto*, cannot be inquired into collaterally." Not liable as partners (*Baker v. Backus*, 32 *Ill.* 107).

*Alexander & Green*, attorneys, and *Ashbel Green*, of counsel for defendant Davison, urged:—I. The liability of stockholders is a part of the statute system of Iowa, incapable of execution *alieno foro*. The remedy is necessarily confined to the sovereignty of Iowa, and can have no recognition or effect beyond the boundary of that State (*Halsey v. McLean*, 12 *Allen*, 443; *Lowrey v. Inman*, 46 *N. Y.* 180; *Pickering v. Fisk*, 6 *Vt.* 102; *Doun v. Lippman*, 5 *Cl. & Fin.* 1; *Ferguson v. Fyffe*, 8 *Id.* 121).

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Defendant's points.

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II. The alleged failure to comply with the requirements of the statute of Iowa, did not, *ipso facto*, create the relation of partnership between the stockholders. The stockholders cannot, without other evidence than the proof of their interest, be held to have authorized each other, as partners, to pledge the credit of the whole, and to have empowered any one of the number to bind all in any matter within the ordinary course of business of the corporation (Central Bank v. Walker, 66 N. Y. 424; National Bank v. Landon, 45 Id. 410; Fuller v. Rowe, 57 Id. 23; Noble v. Fay, 7 Cushing, 189; Trowbridge v. Scudder, 11 Id. 86; Baker v. Backus, 32 Ill. 82).

III. There was no substantial failure to comply with the laws of Iowa (Washington College v. Duke, 14 Iowa, 14; National Bank v. Davies, Id.; S. C. on reargument, 43 Iowa, 435).

IV. The exposition of the Iowa courts upon the construction of statutes of that State is to be taken by this court as conclusive, and to be received with the same force as if the interpretation contained in such decisions was incorporated in the statute in terms (Hoyt v. Sheldon, 3 Bosw. 302; Hoyt v. Thompson, 3 Sandf. 421; Shelby v. Gray, 11 Wheat. 361; Tioga R. R. v. Blossburg R. R., 20 Wall. 137; Elmwood v. Macy, 2 Otto, 289).

V. The passage of the act of 1876, and the filing of the articles in the office of the secretary of State in 1874, cured any invalidity in the organization if any existed prior thereto. 1. The question is one solely for the State of Iowa to deal with (Eaton v. Aspinwall, 19 N. Y. 119; Buffalo & Allegany R. R. Co. v. Cary, 26 Id. 75; Doyle v. Petroleum Co., 44 Barb. 239; Cochran v. Arnold, 58 Penn. St. 399). The law of 1876 practically cured the alleged defect (Black R. R. Co. v. Bernard, 31 Barb. 258; Green v. Seymour, 3 Sandf. Ch. 285; Whitewater Canal Co. v. Vallette, 21 How. U. S.

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414). 2. The liability of stockholder is in nature of penalty (Garrison v. Howe, 17 *N. Y.* 458 ; Merchants' Bk. v. Bliss, 35 *Id.* 412). The act of 1876 took away the penalty, and any cause of action founded thereon fails (Kimbrow v. Colgate, 5 *Batchf.* 229 ; Butler v. Palmer, 1 *Hill*, 324).

*Emott, Burnett & Hammond*, attorneys, and *James Emott*, of counsel for defendants, Duff, Dexter, and Ames :—I. The consequences resulting from a violation of, or a failure to comply with, the provisions of the statutes of Iowa in regard to the formation of corporations are two-fold in their character : first, as affecting the corporation ; and second, as affecting the individual corporators. *First.* The consequence upon the corporation is the forfeiture of its franchises and rights, if the failure to comply with the statute or the violation of its provisions is not condoned by the sovereign power. This result can only be reached in a proper action by the State, and such action must be brought and conducted to judgment before any such condonation, or the forfeiture cannot be enforced. It appears in this case that no such action has ever been brought in the State of Iowa, and that the State, by the act passed March 3, 1876, legalized the formation of this corporation, saving its liability for contracts made prior to the taking effect of the act, and the liability of the individual members thereof to pay up their stock so far as the same is unpaid. *Second.* The consequences of a failure to comply with the provisions of the statute for the formation of corporations, or a violation of that statute, upon those becoming stockholders, is, in the language of the act, "to render the individual property of the stockholders liable for the corporate debts." It will be observed that this is a liability created by the statute, of a penal character,

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imposed upon the stockholders as such, and a liability to the payment of the debts of the corporation.

II. This is not a case like that presented in *Lowry v. Inman*, 49 *N. Y.* 119, where the liability was imposed by the charter of the corporation, and did not arise from its violation or a failure to observe it. The present case is an action founded upon a liability which the defendant did not incur by becoming a member of the corporation, but solely from the fact that he, or some one for whose acts he is responsible, has done or not done something required by law. It is therefore an action on the statute, and not on any contract, express or implied (*Lawlor v. Burt*, 7 *Ohio St.* 340).

III. If this were an action against a stockholder in a New York corporation, under a New York statute, in terms like that of Iowa, it would be barred by the New York statute of limitations (*Lawlor v. Burt*, *supra*). But it is an action on a foreign statute, and no such action will lie in the State of New York. Our courts will not entertain a suit of a penal character upon or to enforce a foreign statute (*Lowry v. Inman*, 46 *N. Y.* 119, and cases cited; *Halsey v. McLean*, 12 *Allen*, 438; *Merchants' Bank v. Bliss*, 35 *N. Y.* 412). The attempt to enforce the statute of Iowa in another State, deprives stockholders in this corporation of important rights conferred by the statute itself, and therefore the remedy given by the statute is necessarily confined to the State of Iowa, and can have no recognition in any other State (*Lowry v. Inman*, 46 *N. Y.* 130; *Halsey v. McLean*, 12 *Allen*, 438; *Pickering v. Fisk*, 6 *Vt.* 162; *Ferguson v. Fyff*, 8 *Clark & Finelly*, 121; *Down v. Lippman*, 5 *Id.* 1).

IV. There is no foundation for the doctrine asserted in the complaint, and upon which this action seems to have been brought, that the failure by the persons organizing this corporation to comply with certain requirements of the statutes of Iowa *ipso facto* created

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them partners, and made the corporation a common law partnership, and its members liable as general partners to all persons dealing with it (Fay v. Noble, 7 Cush. 188-192).

V. The notes upon which this action was brought are the notes of a corporation. The parties who took them, took them as such. The statute creating the liability which is supposed to rest upon these defendants makes them liable for these notes, if at all, as corporate debts; not because they were partners, nor because they directly incurred or authorized these liabilities as their individual debts. The Davenport Railway Construction Company was a corporation *de facto*, until dissolved by the forfeiture of its franchises, adjudged in a proper action. It filed its articles in the proper county office; it published the proper notice in a county newspaper; it commenced business; it dealt with the plaintiffs and gave its notes. Subsequent to its organization, it is alleged that it failed to comply with the requirements of the statute, that it should file a copy of its articles in the office of the secretary of State. But this subsequent default did not turn it from a corporation *de facto* into a partnership. If it had, no such statute as that passed in 1876 would have been passed by the Iowa legislature, or could have had any operation or effect. A violation of a charter, or of laws providing for the organization of corporations, or a failure to observe the requirements of such statutes, does not create the relation of partnership between the stockholders (Central Bank v. Walker, 66 N. Y. 424; Fuller v. Rowe, 57 Id. 23; National Bank v. Landon, 45 Id. 410; Noble v. Fay, 7 Cush. 189; Trowbridge v. Scudder, 11 Id. 86; Cochran v. Arnold, 48 Penn. St. 404; Baker v. Backus, 37 Allen, 107).

VI. This case has been decided against the plaintiffs in the courts of Iowa, and the construction given to the statutes here relied upon, by the courts of Iowa,



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will be taken by the courts of this State as conclusive. It must be received as if the interpretation given by such decisions were incorporated in the statute in terms (*Hoyt v. Sheldon*, 3 *Bosw.* 302; *Howe v. Thompson*, 3 *Sandf.* 421; *Ward v. Gray*, 11 *Wheat.* 361; *Tioga R. R. Co. v. Bloomsburgh R. R. Co.*, 20 *Wall.* 137; *Elmwood v. Macy*, 2 *Otto*, 289). In the case of the First National Bank of Davenport v. Davies, which was a suit brought against a person who was a stockholder in the Davenport Railway Construction Company, the supreme court of Iowa held that the stockholders in the company were not individually liable for its debts. It will be observed that the statute provides, as amended in 1858, that it shall not be applicable to railroad corporations or corporators. The supreme court held, by a majority of the judges, that the Davenport Railway Construction Company was a railway corporation, and that it and its stockholders were entitled to the benefit of this exemption. Since the trial of this case a re-hearing of that case has taken place, and the court adhere to their decision. It is thus the law of the State of Iowa, that these defendants are not liable for the debts incurred by or in the name of the Davenport Railway Construction Company, or for the notes upon which this action is brought (*National Bank v. Davis*, 43 *Iowa*, 435. See also *Washington College v. Duke*, 14 *Id.* 14).

VII. The passage of the act of 1876, page 291, together with the previous filing of the articles of this company in the office of the secretary of state in 1874, waived any invalidity in the organization of this company, if any existed prior thereto. The liability of these defendants as stockholders, if any ever existed, was in the nature of a penalty for a failure to observe the statutes of the State. The act of 1876 condoned this failure, and dispensed with this penalty, and the question was one solely for the State of Iowa to deal



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with (Merchants' Bank v. Bliss, 35 *N. Y.* 412; Black River R. R. Co. v. Barnard, 31 *Barb.* 258; Eaton v. Aspinwall, 19 *N. Y.* 121; Doyle v. Petroleum Co., 41 *Id.* 244; Cochran v. Arnold, 48 *Penn. St.* 404).

*Evarts, Southmayd & Choate*, attorneys, and *Joseph H. Choate*, of counsel, for plaintiffs:—I. By the true construction of the statutes of Iowa in question, and according to the settled principles of the common law, the defendants, having assumed to act as in a corporate capacity, without a legal organization as a corporate body, are liable as partners to those with whom they contract and to the full extent of the notes given in the name of the company for goods purchased of the plaintiffs (Fuller v. Rowe, 57 *N. Y.* 23; Wells v. Gates, 18 *Barb.* 554; Townsend v. Goewaey, 19 *Wend.* 424; Cross v. Jackson, 5 *Hill*, 478; Dennis v. Kennedy, 19 *Barb.* 517. See also opinion of DAY, J., in First Nat. Bank of Davenport v. Davies, printed in the case; Dubuque v. Dubuque, 7 *Iowa*, 262; Dishon v. Smith, 10 *Id.* 212; McKellar v. Stout, 14 *Id.* 359). The recording of the articles of incorporation in the office of the secretary of State, and the due publication in the time prescribed by law are essential to the existence of the corporation, and there being no corporation, there is no shield against the common law liability of the defendants. The situation of the defendants is analogous to that of stockholders carrying on business by agreement after the dissolution of the corporation (Nat. Union Bank of Watertown v. Landon, 66 *Barb.* 189; Cunnaston v. McNair, 1 *Wend.* 457). This case is distinctly reaffirmed by the court of appeals in Bank v. Walker, 66 *N. Y.* 429. Defendants seek to present the case as an attempt on the part of the plaintiffs to inflict upon the private property of the defendants as stockholders a liability as if created by statute and by that only imposed on their property as stockholders.

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That is not our position. We claim that there was no corporation existing at the time these purchases were made and these notes given, and that, as a consequence, the defendants were left uncovered and unable to hide their personalty from liability under the corporate shield, and that the statutes of Iowa afford them no protection. This renders inapplicable and ineffective the chief portion of the propositions arrayed in the elaborate brief presented by the defendants. The case is in no wise an attempt to annul or forfeit the charter or franchise of a corporation, which prerogative pertains only to the sovereignty. The cases, from the reports of Illinois and California, set forth under Mr. Sanders' second point, will be found to have been, in part, suits between companies and stockholders upon subscriptions for stock, where the perfected organization of the corporation was not material to the liability ; in part suits to enforce penal liability of stockholders for failure to comply with statutory requirements imposed upon the corporation ; and all arising under different statutes, the language and meaning of which are wholly different from the statute of Iowa. So that the general observations cited from those cases are wholly inapplicable here. What is essential to the perfection of the corporate existence is, of course, dependent upon the particular language and provisions of the statute in each case. But the Illinois cases cited in the brief of defendants' counsel have been expressly overruled by a recent case in that State (*Bigelow v. Gregory*, 73 *Ill.* 197), which is a conclusive authority in plaintiffs' favor. Again : the nature of the action, and the relation of the parties, between whom the controversy arises, is in the highest degree material, if we would avoid confusion. We are suing individuals, as individually liable, not because they are stockholders of a corporation, but because there was no corporation, and they were not stockholders ; not merely upon a

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statutory liability, but upon a liability against which they are seeking to interpose a statutory protection as a defense. This distinction, clearly observed, disposes of the long array of cases from our own reports cited in Mr. Sanders' fourth point. So, too, the propositions that proceedings for a forfeiture of franchises of a corporation must be had in the State of its creation, and that proof of user is sufficient evidence of corporate existence in certain suits between the corporation itself and parties dealing with it, and that liability of stockholders, as such, under the provisions of statutes, is always statutory; and that, as between corporations and parties contracting with them, as such, in suits arising between them, the parties so contracting are, for the necessary purposes of justice and to prevent fraud, estopped to deny the corporate existence of the company at the date of the contract; and that, a corporation being created, there is at common law no individual liability of stockholders for its debts—are all propositions well enough in themselves to be applied in proper cases and between proper parties, but are wholly out of place and irrelevant in this contest, where the question is, whether the defendants can find in the statutes of Iowa, and in the proceedings had thereunder, statutory shelter from the individual liability otherwise incurred by them by the purchase and receipt of the plaintiffs' property and by their notes given in payment therefor.

II. By the Code of Iowa as amended in 1870, the filing of a copy of the articles of incorporation in the office of the secretary of State was necessary to the valid creation of the corporation. The language of the statute is mandatory and not simply directory. This certificate not being filed, it followed that there was no corporation (Supreme Court of Iowa, First National Bank of Davenport v. Ludwig S. Davies, administrator, in MSS., see opinion of DAY, J.). Even

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without any further provision of statute it necessarily followed by the established principles of common law, as illustrated by the cases in our own courts, cited under our first point, that parties purchasing property in the company name, and giving for it a note in the corporate name, were individually liable upon the note as copartners. But the Code of Iowa (§ 1166), which the defendants invoke for their protection, expressly so declares: "A failure to comply substantially with the foregoing requisitions, in relation to organization and publicity, renders the individual property of all the stockholders liable for the corporate debts." The failure to file the certificate in the secretary of state's office was a "substantial failure to comply with the requirements." The amendment of 1870 made the filing there fundamental, if it was not before (*Vid.* on this point also, DAY, J.'s opinion). But, secondly, at any rate it was the settled law of Iowa, at the time of the giving of the notes here sued on, that by the true construction of this and similar statutes of that State, as expounded by the supreme court of that State, the failure to file such a certificate was fatal to the attempted creation of the corporation, and left the so-called stockholders exposed, as at common law, to liability for the debts of the company (*Township of Dubuque v. City of Dubuque*, 7 *Iowa*, 262; *Dishon v. Smith*, 10 *Id.* 212; *McKellar v. Stout*, 14 *Id.* 359; opinion of DAY, J., *ut supra*). And, thirdly, by the very principle of comity, contended for by the defendants, and so ably expounded in their briefs, that the construction put upon the statutes of a State by the fixed and settled decisions of the courts of that State in matters of local law, is to be adopted and followed by the tribunals of other States in interpreting the same statutes, this court is bound to say that at the time of the giving of the notes here sued on, it was part of the law of Iowa that the failure to file the certificate

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of incorporation in the secretary of state's office was fatal to the attempted defense of the defendants against their individual liability upon the notes, either at common law or under the statutes in question (*Hoyt v. Thompson*, 3 *Sandf.* 421 ; *Hoyt v. Sheldon*, 3 *Bosw.* 302 ; *Elmendorf v. Taylor*, 10 *Wheat.* 159 ; *Shelly v. Grey*, 11 *Id.* 367 ; *Greene v. Lessee of Neal*, 6 *Peters*, 298).

III. The Davenport Railway Construction Company was not and is not a "railroad corporation," and its so-called "stockholders" are not therefore exempted from the liability otherwise incurred by section 1338 of the Code of Iowa,—which enacts that section 1166, already cited, "shall not be deemed and construed to be applicable to railroad corporations and corporators ; and stockholders in railroad companies shall be liable only for the amount of stock held by them in said companies." To say that such a construction company, organized for the sole purpose of building railroads for railroad companies to own and operate, but to own and operate no railroads itself, is a railroad corporation, is abhorrent to common sense and common honesty, and no court administering justice would so hold. Consistently with those old fashioned elements of justice, viz., common sense and common honesty, there can be no possible answer to the reasons stated by BECK, J., on the reargument in the Dane's case, 43 *Iowa*, 435, 436. It cannot be denied that at the time of the giving of the notes sued on, wherever railroad corporations were known, not only in Iowa but in all civilized States and countries, the settled definition of the term did not include, but excluded a construction company, having no power to act as a common carrier, or to own and operate a railroad, or to exercise railroad franchises thereon. This distinction between a railroad corporation and other corporations was clear throughout the statutes of Iowa (*Vide Revision of 1860, passim*). It

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was clearly stated by the supreme court of Iowa, long before the notes here sued on were issued (*Vide State of Iowa v. County of Wapello*, 13 *Iowa*). No suggestion to the contrary had ever been made in the courts of that State. Nothing so monstrous had even yet been whispered or imagined, for the sake of screening some local debtor from his legal liabilities, as that a construction company, which had no one of the elements or features of the corporation known to the people and courts of all English-speaking States, as railroad corporations, was included within that definition. Upon the principle of comity, therefore, to which the defendants have themselves appealed, this court, construing the statute in question at the time of the giving of the notes sued on, according to the settled principles of law, alike as expounded by the courts of Iowa, as of every other State, must have held that the construction company was not a railroad company, and that, therefore, the defendants were personally liable, as adjudged in the court below.

IV. And this brings us to the final and most interesting question in the case, viz: Whether the courts of this State, in a case arising here upon a contract made and to be performed here, between defendants, not citizens of Iowa, and plaintiffs, all citizens of New York, are bound to follow the supreme court of Iowa in a reversal and change of the law, as it is shown to have there existed at the time of the giving of the note sued on, such reversal and change being first promulgated in a decision made in December, 1875, more than three years after the contract in suit was made, and the rights of the parties thereunder had become vested. We confidently submit that our courts are not so bound, but that, on the contrary, they must protect the suitors before them in their vested rights, and hold them to their legal liabilities as fixed by the law as it existed when those rights became vested and those

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liabilities fixed. *a.* It is desirable, in the first place, to ascertain just what the courts of Iowa have done in the premises since that time. In the case of *First National Bank of Iowa v. Davies*, commenced July 29, 1874, two years after the notes in suit were given, and first decided at the December term, 1875, the supreme court of that State, by a closely contested and divided vote, gave to a local statute a retrospective and retroactive construction, differing from that which was understood and in force at the time of the making of the contract sought to be enforced, and to the prejudice of the rights and obligations of the parties then and thereby vested and fixed. This certainly cannot be called, even at this time, a fixed and settled construction of the local statute by an unbroken series of decisions such as the supreme court of the United States requires, to establish the rule of comity, even as bearing on subsequent contracts and subsequent cases. *b.* The rule of comity contended for, as applied and expounded by the courts best entitled to administer it, does not admit of any such interpretation and result. That rule holds the parties to what, according to the law as expounded at and prior to the time of the making of the contract, they must have understood their respective rights and liabilities to be. This is entirely consistent with the usual method of application of the rule of comity, which, as stated by this court in *Hoyt v. Sheldon*, 3 *Bosw.* 302, accepts the construction of the statute by the courts of the State which enacted it, "with the same force as if that interpretation was incorporated in the statute in terms." Neither the legislature nor the courts of the State enacting the statute, however, will in another forum be permitted, by a subsequent change of the construction of the statute, to impair the obligation of contracts already fixed. This was so ruled in *Butz v. City of Muscatine*, 8 *Wall.* 575; *Von Hoff-*



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man v. City of Quincy, 4 *Wall.* 557. c. We submit, also, that the facts peculiar to this case, that the contract was made here, and by its terms was to be here performed, between parties, none of whom, so far as it appears, resided in Iowa, and that the subsequent decision in Iowa, adverse to our claim, was rendered after great dispute by a closely divided court, and evidently under local prejudice, and for the relief of a resident intestate, are considerations calculated greatly to weaken its influence upon the judgment of this court. Authority it is conceded by the rule of comity to have none. d. As to the question of what is a railroad corporation, that is not at all a matter of local law, any more than what is a partner, or what is a surety, or what is a bill of exchange. It is a question of general, of common law, of common sense, dependent upon the general principles of law, and the common understanding of the English language.

V. There is nothing in the point that this court has no jurisdiction of the case. It is based upon the same erroneous notion that we have here nothing but a statutory liability to enforce, and utterly ignores the common law liability of the defendants as partners. All that the much-vaunted case of *Lowry v. Inman* (46 *N. Y.* 120), holds is, that, where there is nothing but a statutory remedy, that remedy must be strictly pursued. There is no intimation that the courts of this State have no jurisdiction over the defendants to enforce the personal liability under which they rest. Sections 1172, 1173, 1174, have no reference whatever to such a common law liability or to suits thereon, but only to any statutory liabilities of the private property of the stockholders as such, created by the act itself. Besides, there is nothing in the facts proved here to create any defense to the action under any or either of these sections. Section 1173 relates wholly to proceedings after judgment, and even as to that the proof re-



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quired by this section was given of a judgment and execution returned unsatisfied, and a demand made and not complied with. Section 1174 is alike inapplicable. It does not create a defense. It only provides in a certain contingency for a continuance of the cause or a stay of execution. The act does not require, even for the purposes of a suit to enforce the statutory liability against the property of stockholders, the commencement of suit and issue of judgment and execution on the same claim against the company, but only that, before a levy on the private property of the stockholders, the requisite proof must be given that corporate property cannot be found to satisfy the same. In the nature of things, these sections can have no application to a suit like this, in another jurisdiction against the defendants as copartners.

VI. There was no error in admitting the defendants' own notes in evidence against themselves, it appearing that they were jointly engaged in business under the name in which the notes were issued, and that the same were given by their representative for goods sold and delivered to them, and used in their common business. The cases cited by defendants from the courts of Massachusetts and Pennsylvania, as bearing upon this point, so far as they are contrary to the well-established law of this State, as illustrated by the cases cited under our first point, are of no moment.

BY THE COURT.—SPEIR, J.—In 1871 the defendants, together with one Edgar Thompson, now deceased, entered into an agreement among themselves, and with others whom they should associate with them as a body corporate in law to transact the business for furnishing materials for, and the building, making, and equipment of railroads in the State of Iowa, and all proper extensions of the same in adjoining States, hav-

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ing the principal office or place of business at Davenport in that State. Subsequently the said defendants, with the other defendants who became associated with them in the business, and who also became stockholders of the proposed company, entered upon the transaction of the business so proposed, and continued to conduct it under the name of the Davenport Railway Construction Company, and under that name made and delivered the promissory notes in suit.

The first question presented is: had the defendants a legal, corporate existence, when in the name of the company they made, indorsed and delivered the several notes set out in the complaint?

What is necessary and essential to create a corporate existence must depend upon the particular construction of the language and provisions of the statute in each case.

It appears that the defendants proposing to become incorporated failed to comply with the requirements of the statute as to the recording of articles of incorporation in the office of the secretary of state, and the due publication in the time prescribed by law. The plaintiffs claim that by this omission, by the true construction of the statutes of Iowa, and according to the settled principles of the common law, the defendants assuming to act in a corporate capacity without legal organization as a corporate body are liable as partners to those with whom they contracted. The suit is therefore brought against the defendants as individuals, liable, not for the reason that they are liable as stockholders of a corporation, but because there was no corporation, and they were not stockholders—not merely upon a statutory liability, but upon a liability against which they seek to shelter themselves by interposing a statutory protection as a defense.

The articles of incorporation in question were filed in the office of the recorder of deeds on May 17, 1871. The

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law in force at that time—*Revision*, § 1152, as amended by chapter 172, *Laws of 1870*,—provides: “Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor, and in the office of the secretary of state in a book kept for that purpose.” Section 1154 provides that a notice must be published for four months in succession in some newspaper, as convenient as practicable to the principal place of business. Section 1155 prescribes the contents of such notices. Section 1156, as amended by the same chapter, is as follows: “The corporation may commence business as soon as the articles are filed in the office of the recorder of deeds, and their doings shall be valid if the publication in a newspaper is made, and the copy filed in the office of the secretary of state within three months of such filing in the recorder’s office.”

It is to be observed, first, that the language of section 1152 is mandatory and not merely directory. It affirms the want of any right to enter upon any business except that of organization until the articles of incorporation are adopted and recorded in the office of both the recorder of deeds and the secretary of state. The use of the negative expression determines the mandatory character of the statute. When the statute imposes a duty and gives the means of performing it, it is held to be mandatory (*Cooley Constitutional Limitations*, 89, 4th ed.; *People v. Schermerhorn*, 19 *Barb.* 558). The language of section 1156, as amended by the same chapter, permits the corporation to commence business as soon as the articles are filed in the office of the recorder of deeds, but significantly adds, “Their doings shall be valid if the publication in the newspaper is made and the copy filed in the office of the secretary of state within three months after such filing in the recorder’s office.” Section 1166 provides: “A failure to

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comply substantially with the foregoing requisitions in relation to organization and publicity, renders the individual property of all the stockholders liable for the corporate debts." *McKelly v. Stout*, 14 *Iowa*, 359, decides that the prime object of this requirement is to make individual corporators liable for the failure to do those things which are necessary to the transaction of business (*City of Dubuque v. City of Dubuque*, 7 *Iowa*, 262; *Dishon v. Smith*, 10 *Id.* 212-218). These statutes have received the same construction in the neighboring State of Illinois as in Iowa (*Bigelow v. Gregory*, 73 *Ill.* 197).

It must, I think, be considered by the construction of these and the like statutes in Iowa, as expounded by the supreme court of that State at the time the notes herein sued on were given, as settled law, that the failure to file the articles of incorporation in the office of the secretary of state, was fatal to the attempted creation of the corporation, and the stockholders, consequently, were left exposed, as at common law, to individual liability for the debts of the company.

The company, then, existing in name only, independent of any sanction of general or special law, can be nothing more than an ordinary partnership, and subject to the same laws. It cannot be said that proceeding to transact business with third parties they incur no liability. They were not liable as stockholders, for there was no corporation. There being no corporation, each must be liable as a partner at common law. Assuming to act under a corporate name without a legal organization as a corporate body, they must be held liable as partners to those with whom they contracted. At that time they had a community of interest in the property, and they were entitled to share in the profits, and bound to bear the losses resulting from the business (*Fuller v. Rowe*, 57 *N. Y.* 23; *National Union Bank of Watertown v. Landon*, 45

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*Id.* 410 ; affi'g 66 *Barb.* 189 ; Wells v. Gates, 18 *Id.* 554).

The defendants' liability is not affected by the fact that the plaintiffs, when they took the notes, supposed they were the notes of the corporation, and were ignorant of their corporate existence. They believed the paper to be that of the incorporation, from the fact that the business was done in the same name, and they had a right to proceed against the real makers of the notes, upon discovering who were transacting business under that name (*National Bank of Watertown v. Landon, supra*). Nor does the fact that because the defendants did not intend to become copartners at common law, and become liable as general partners, furnish any answer to the claim of the plaintiffs. It is enough that the parties assumed to act in a corporate capacity, without a legal organization as a corporate body. The court say, in *Fuller v. Rowe*, cited above, it cannot be denied that they are liable as partners in such a case to those with whom they contract. Intention of the parties has nothing to do with their liability. The legal effect of the nature of the agreement into which the defendants entered, was such that it made them partners until they should comply with the essential proceedings declared by the statutes of Iowa, to become a corporation. The only question involved in such a case, relates solely to the liability created by the defendants, to all persons with whom they deal. It is unnecessary to refer to the numerous instances where parties are guiltless of any intention of creating a partnership relation, which the law nevertheless pronounces does exist, and enforces the liability arising out of that relation.

It is claimed that a corporation in fact and *user* under it were sufficient to show a corporation *de facto*, and that these omissions to comply with the statutes cannot be urged collaterally against their existence, but only in a direct proceeding. The defendants sought

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to join themselves into a corporation under the provisions of a general law. In such a case it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. Where a corporation is created by a special charter and there have been acts of *user* under it the rule may have some application.

Section 1338 of the revised code, passed March 20, 1858,—which is as follows: “Be it enacted by the general assembly of the State of Iowa, that section 689 of the code” (this section is identical with section 1166 of the revised code) “shall not be deemed and construed to be applicable to railroad corporations and corporators; and stockholders-in railroad companies shall be liable only for the amount of stock held by them in said companies,”—has no application to the present case.

The Davenport Railway Construction Company was organized for the purpose of furnishing materials for constructing railroads generally, and not for the purpose of building and operating railroads. The defendants did not suppose that they were authorized to build and operate railroads, nor did they organize for that purpose. In August and September, 1871, before they made the notes in question, they published in the *Daily and Weekly Davenport Gazette*, a notice of their incorporation—giving the title of their company, place of business and its general nature,—which was “to make and perform a contract with the Davenport and St. Paul Railroad Company to furnish iron and equipments for the said company’s roads, including the construction of depots, machine-shops, water-stations, and all such other buildings and accessories as shall be necessary to the successful operation of said road.” Can there be any doubt what the real intention of the defendants was? They published to the world what the general nature of their business was; not to operate a railroad, but to make and perform a contract with a

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Opinion of the Court, by SPEIR, J.

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railroad company then in existence, which was owned by and being or to be operated by another and separate company.

An examination of the revision of the statute of 1860 makes it apparent that there is a clear distinction between a railroad corporation and all other corporations, and the supreme court of the State of Iowa has settled that such distinction existed before and at the time the notes in question were issued. *State of Iowa v. County of Wapello* (13 *Iowa*, 388), overruling *Dubuque County v. Dubuque & Pacific Railroad Co.* (4 *G. Green*, 1), and approving *Stokes v. County of Scott* (10 *Iowa*, 166) decides that the legislature has no power to authorize counties to become, as corporations, stockholders in railroad companies. A construction company, which contains no element heretofore known to our courts or to the public as railroad corporations, would be a more startling proposition than that counties could become stockholders in railroad corporations.

The case comes up before this court on a contract made and to be performed in New York, between plaintiffs, all citizens of New York, and defendants, not citizens of Iowa. The contract in the suit was made, and the rights of the parties thereunder became vested at the time the law existed as settled in the State of Iowa. Three years thereafter, the supreme court of the State reversed the law, which till then had been deemed settled by a decision first made known in December, 1875. Although the case was first heard by two judges, the diversity of their opinions was so great it may be justly said, that nothing was decided by the court. DAY, J., *held*, that the filing of the articles of incorporation in the office of the secretary of state, was essential to the valid creation of the corporation, but that it was a railroad corporation, and its stockholders were exempt from liability, while the other



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justice, BECK, held the reverse on both propositions. Afterwards, at the June term, 1876, since the trial of the case at bar, a rehearing was had, and all the five judges of the court took part, and here again they divided, three to two. BECK, SEVERS, and ROTHRIK holding the filing to be non-essential, and the other two dissenting from that, and DAY, SEEVERS, and ROTHRIK holding that it was a railroad corporation, and the other two judges dissenting from that.

When we consider what a railroad corporation is—that it has nothing to do with local law, that the term is so well defined, and conveys the idea of oneness so absolutely as to be incapable of two different meanings—that it is simply a definition of a substantive thing—as well and as universally known and understood by all English-speaking people as the definition of law itself, or as any other term well known and defined in the common and accepted use of our language, the courts of this State and of other States upon principles of comity according to the settled principles of law must, we think, hold that at the time of the giving of the notes the construction company was not a railroad company, and that the defendants were personally liable as adjudged in this court below. Comity holds the parties to what according to the law as expounded at and prior to the time of the making of the contract they must have understood their respective rights and liabilities to be. It accepts the construction of the statute by the courts of the State which enacted it with the same force as if that interpretation was incorporated in the statute in terms. The fundamental law will not permit either the legislature, or the courts of the State enacting the statute, by a subsequent change of the construction of the statute in another forum to impair the obligation of contracts already fixed.

The rule is stated with precision in the case of *Butz v. City of Muscatine* (8 *Wall.* 575). The su-



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preme court of Iowa had, by a uniform course of decisions, promulgated after the issue of the city bonds, denied the right of the holders to the remedy sought under the acts in force at the time of their issue. It holds that under the statute of Iowa, in force when the contract was made, the relator was entitled to the remedy he asked, and that this right can no more be taken away by subsequent judicial decisions, than by subsequent legislation (*Von Hoffman v. City of Quincy*, 4 *Wall.* 535). In *Edwards v. Kearzy* (15 *U. S. Sup. Ct.*, reported in full in *Albany Law Journal*, May 4, 1878, p. 346), it was held that a law of North Carolina, exempting personal property and a homestead of a debtor from sale and execution, was invalid as to debts contracted before its enactment. The court says: "The remedy subsisting in a State when and where a contract is made, and is to be performed, is a part of the obligation, and any subsequent law of the State, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is therefore void." In *Brown v. Kenzie* (1 *How. U. S.* 311), TANEY, Ch. J., speaking of the protection of the remedy, says, it is this protection which the clause of the constitution now in question mainly intended to secure. In *Green v. Ridder* (8 *Wheat.* 11), STORY, J., "If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired and rendered insecure, according to the nature and extent of such restrictions;" and at page 75, "The prohibition of the constitution embraces all contracts executed or executory between private individuals, or a State and individuals, or corporations, or between the States themselves."

It appears that the defendants were jointly engaged in business under the name in which the notes were

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issued, and that they were given by their representatives for goods sold and delivered to them and used in their common business. I see no good reason why they should not have been given in evidence against themselves.

We think the exceptions should be overruled, and judgment upon the verdict ordered with costs.

FREEDMAN, J., concurred.

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DAVID LEVY, ET AL., PLAINTIFFS AND RESPONDENTS, v. SOLOMON LOEB, ET AL., DEFENDANTS AND APPELLANTS.

I. *Practice.*

1. EXAMINATION OF PARTY TO ACTION BEFORE TRIAL.

(a) ORDER FOR.

1. *Obligatory* on judge to grant.

(b) *Vacatur of order, power of court* as to.

1. Although it is obligatory to grant an order for examination upon presentation of an affidavit complying in form with the requirements of section 872, *yet the order, when granted, may be vacated for cause shown.*

1. CAUSE, WHAT IS. If the affidavit on which the order was obtained is defective in any necessary particular, or if the allegations contained therein, though sufficient by themselves, are successfully met by opposing proof, cause for a *vacatur* is shown.

(a) *Winston v. English*, 44 *How. Pr.* 398. The rules laid down in this case may still be followed with safety.

II. *Application of above principles.*

1. After service of a complaint setting forth a good cause of action with sufficient certainty, but before answer, plaintiffs, upon an affidavit setting forth various facts which, might perhaps, have

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Statement of the Case.

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been sufficient to call for an examination in case a general denial had been interposed, but not claiming that plaintiffs desired to amend their complaint, and that the examination was material and necessary for that purpose, the claim being, simply, that it was material and necessary for the prosecution of the action, obtained an order for the examination of two of the defendants. Those defendants moved to vacate the order upon the papers on which it had been obtained, and on an affidavit showing that prior to the commencement of this action, the defendants had brought an action against the present plaintiffs, that in that action the present plaintiffs had set up by answer the cause of action now sued upon, had procured an order for the examination of the defendants, had actually examined one of them at considerable length, on presumably the same issues as will arise in the present case, and that said examination had been finished and closed.

*Held,*

*sufficient cause for a vacatur had been shown.*

1. PROOF OF CASE UPON DEFAULT.

1. *A claim* that if defendants should fail to answer, the examination of some of them would be necessary to enable the plaintiff to obtain judgment on application to the court, held, under the circumstances, to be of *too speculative a character to uphold the order.*

III. SYSTEM OF PRACTICE, OF WHAT CONSTITUTED.

1. The code of civil procedure.
2. Unrepealed portions of the old code.
3. Statutes not embraced in either.
4. Rules and practice of the courts preserved by section 469 of the old code, so far as they are not inconsistent with later legislative enactments.

1. CONSTRUCTION OF ANY PARTICULAR SECTION, OR PART OF THE SYSTEM.

- (a) If it be intricate, obscure or doubtful, its meaning is to be ascertained by *comparing it with the other sections or parts* in the light of the general legislative intent disclosed by the whole system with respect to the section or part questioned.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

• Appeal from order denying defendant's motion to vacate an order for the examination of several of the

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Appellants' points.

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defendants after service of summons and complaint, and before issue joined.

The motion was founded on affidavit, and it was denied solely on the ground that the code of civil procedure gives an absolute right to such examination, or, in other words, that there is no power to vacate the order.

*Mann & Parsons*, attorneys, and *Will. Mann*, of counsel, for appellants—I. Outside of the provisions of the code peculiarly applicable to this subject, all courts of record have power to control, modify, and vacate their orders or mandates, or to stay their operation. If the court finds that any order has been obtained from it by misrepresentation, or suppression of material facts, or for purposes of oppression or vexation, the court will so control or direct its order as to prevent its doing harm to the adverse party. The statement of this principle is its sufficient argument.

II. Is there anything in the Code of Procedure as now in force limiting the general power thus possessed by the court to vacate its own order? Section 873 provides that upon such affidavit the judge must grant an order, &c. The wording of this section leaves no room for doubt that it is obligatory on the officer to grant the order. The only provision in regard to the mode of examination is contained in section 880. "The judge taking the deposition must insert therein every answer or declaration of the person examined, which either party requires to be inserted." The language of this section is very peculiar. It does not require the insertion of question and answer, but only of the answers. This part of the statute has not been altered from the old or former code. The provision there was (§ 392) that the party should be compelled to attend in the same manner as a witness to be examined conditionally, "and the examination shall be taken and filed by the

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Appellants' points.

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judge in a like manner." The former provision as to taking the testimony of a witness conditionally, and which is referred to by this last quoted section, is found in the *Revised Statutes*, 2 *Edmonds*, p. 415, § 37, and is identical with the first part of the present § 880. The compilers of the present code have simply taken the old § 37 of the act in regard to perpetuating testimony, and made a section of the code out of it. Consequently the rule laid down by the present code for conducting the examination is precisely (*verbatim*) the same as formerly. Under the old rule, it was always held that the officer taking the deposition had power to rule on questions asked the witness (party), as to their materiality, competency, &c. (*Plato v. Kelly*, 16 *Abb. Pr.* 188; *Gibson v. Pearsall*, 1 *E. D. Smith*, 90; *Glenney v. Stedwell*, 64 *N. Y.* 120), delivering the unanimous opinion of the court of appeals, after stating that the examination before trial is a substitute for the bill of discovery, says: "It is for the judges now, by rules of practice and by ruling at the examination, to keep the plaintiff (meaning party) within proper bounds, and to ward off from the defendant all inquiry that is vain or curious." It appears, therefore, that the only provision on this matter that has been affected by the new code is the making the granting merely of the order obligatory. The reason for this change is very apparent. It is well known that one of the courts has always refused the order to examine unless the moving papers made out such a case as would have entitled the party to relief in equity on a bill of discovery. An instance of this ruling was the decision at special term of the common pleas in *Garrison v. Mariposa Co.*, not reported, but cited in *Carr v. Great Western Ins. Co.*, 3 *Daly*, 160, and the then rule of the court of common pleas, rule 21, of Jan., 1871. It was to abrogate this ruling and practice in that court, and any similar ruling in other courts, that the present

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Respondents' points.

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language in regard to granting the order was enacted, so as to make uniform the practice in the different courts as to the applicant's technical right to have the order made. When the order is made and the witness comes into court, then the proceeding is before the court for its control, and the examination of the witness is to be conducted exactly as heretofore, that is to say, as laid down in *Glenney v. Stedwell*, *supra*. But again, it was absolutely necessary that the control of the examination should be left with the court, for if the court had no power to control, and it was obligatory to take the examination as well as in the first instance to make the order, then the attorney may take out as many successive orders against the same witness (party) as he chooses, and have each time the same examination taken, certified, and filed, to the great oppression of his adversary (See also note to *Phenix v. Dupuy*, 2 *Abb. N. C.* 159).

III. We submit that this is a case where all the circumstances (the counsel had before particularly adverted to them) show that the order for examination was obtained only for purposes of vexation and oppression; that the examination, if permitted to proceed, would be, in the words of the court of appeals, "vain;" and that the order of the special term should be reversed, with costs, and the order for examination vacated.

*S. Kaufman*, attorney, and *Lewis Sanders*, of counsel, for respondent:—I. This court will not try the merits of an action upon an *ex parte* affidavit of counsel when not one of the allegations of the complaint is denied, and no affidavit of merits is interposed. For the purposes of the motion every allegation of the complaint must be taken to be true.

II. Section 873, code civil procedure, provides that "the judge, to whom such affidavit is presented, must

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Opinion of the Court, by FREEDMAN, J.

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grant an order for the examination, if an action is pending." The language is in the imperative mood—there are no qualifications or conditions. In the opinion of the learned judge below, the right is absolute. So held by the supreme court (*Webster v. Stockwell*, 3 *Abb. N. C.* 120).

III. If the word *may* had been used instead of *must* in the statute, the result would have been the same. It would still have been obligatory upon the judge to grant the order, as the rights of the parties depend upon such examination (*Mayor v. Fruze*, 3 *Hill*, 615). "May, in the case of a public officer, is tantamount to shall; and if he does not do it (the act required), he shall be punished" (*King v. Inhabitants of Derby, Skinner*, 370; *King v. Barlow*, 2 *Salk.* 609; *People v. Sup. Otsego Co.*, 51 *N. Y.* 406–7; *Martin v. Mayor of Brooklyn*, 5 *Cow.* 547; *Alderman Blackwell's Case*, 1 *Vernon*, 153; *Phelps v. Hawley*, 52 *N. Y.* 27).

IV. If such is the rule of law when the statute is permissive only, *a fortiori*, must it be mandatory when the most apt word in the language says that it *must* be done?

V. This court at general term having passed upon this question where the statute was not, as now, in the imperative mood—it is *stare decisis* here.

BY THE COURT.—FREEDMAN, J.—Prior to the recent revision of the statutes, this court had steadily adhered to the view that the right of a party to an action to examine the adverse party did not, under the code as it then stood, arise after issue joined, but that it existed from the time of the commencement of the action (*McVickar v. Greenleaf*, 4 *Robt.* 657; *Fullerton v. Gaylord*, 7 *Id.* 551; *Duffy v. Lynch*, 36 *How. Pr.* 509), and that this right could not be abrogated by rule (*Glenney v. Stedwell and the World Mutual Life Ins. Co.*, 40 *N. Y. Superior Court R.* [8 *J. & S.*] 92).

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Opinion of the Court, by FREEDMAN, J.

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Other tribunals differed more or less with this court upon this question, but the court of appeals on affirming the case last mentioned (64 *N. Y.* 120), settled the law in conformity with the views of this court.

At the same time this court considered it but just, and even necessary for the protection of the party to be examined, that the papers supporting the application should fully establish, by facts and circumstances, the good faith of the application and the materiality of the examination sought and if they were deficient in that respect, the application was denied, or the order, if inadvertently granted, vacated pursuant to order to show cause. Thus, in *Winston v. English*, 35 *N. Y. Superior Court R.* (3 *J. & S.*) 512, an order made for the examination of the plaintiff before service of the complaint was set aside because the examination could not, at that stage of the proceedings, be said to be necessary. It could not be said to be necessary to enable the defendant to prepare his answer, for, until the complaint was served, he could not know what the alleged cause of action was or would be, nor what he would have to answer; nor could it be seen that it was material in aid of a defense, until an issue had been framed.

After the complaint had been served, the defendant obtained a new order, but that was again vacated on the ground that the defendant had not sufficiently shown the necessity of the examination, nor sufficiently satisfied the court of the good faith of his application. The rule was stated as follows:

“Whenever, therefore, a party applies, under section 391, after issue joined, for the examination of the adverse party as to matters within the issues, the application is usually granted as a matter of course and of absolute right. In such case slight evidence is sufficient to satisfy the court as to the materiality of the discovery sought.

“But when the examination is sought at an earlier



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stage, where the danger of abuse is imminent, and the difficulty of restricting the examination within reasonable limits great, the court is bound to ascertain by evidence, not only that the examination is material, and how it is material, but also that it is made in good faith, and for a necessary and proper purpose.

“If all this is shown affirmatively, the examination is a matter of right, but otherwise not” (Winston v. English, 44 *How. Pr.* 398).

These views also found support in the court of appeals, for, in delivering the unanimous opinion of that court in *Glenney v. Stedwell*, 64 *N. Y.* 120, Mr. Justice FOLGER, after stating that the examination before trial is a substitute for the bill of discovery, says: “It is for the judges now, by rules of practice, and by rulings at the examination, to keep the plaintiff (meaning party) within proper bounds, and to ward off from the defendant (meaning adverse party), all inquiry that is vain or curious.”

In enacting the Code of Civil Procedure, the legislature attempted to provide by express provisions, for the exercise of the right of examination.

By section 870, the right is given at any time before trial, as prescribed in the article of which that section forms a part. Section 872 prescribes the requisites of the affidavit to be presented by the party applying for the examination.

Section 873 provides that the judge to whom such an affidavit is presented, must grant an order for the examination at a time and place to be therein specified.

Section 876 provides, that upon proof by affidavit, that service of a copy of the order, and of the affidavit has been duly made, as directed in the order, the judge or the referee must proceed to take the deposition of the witness at the time and place specified in the order. He may, from time to time, adjourn the

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examination to another day, and to another place, within the same county.

By section 880, the judge or referee taking a deposition is required to insert therein every answer or declaration of the person examined, which either party requires to be inserted.

Under section 881, the deposition, or a certified copy thereof, may be read in evidence by either party, at the trial of, or upon the assessment of damages, by writ of inquiry, or upon a reference, or otherwise, in the action specified in the original affidavit, or any other action thereafter brought, between the same parties, or between any parties claiming under them, or either of them, &c. &c.

Other provisions not necessary to be mentioned here regulate the service and the enforcement of the order, the manner in which the deposition is to be taken, completed, certified, and filed, and its use and effect.

Upon the provisions specially referred to, it has been contended that upon the mere presentation of an affidavit complying in form with the requirements of section 872, the right to the examination is absolute, if an action is pending; that in such case the judge to whom the affidavit is presented, must grant the order, and that the order, when once made, cannot be vacated for cause assigned by the party to be examined.

If this were so, the order for the examination would amount to a general, irrevocable, statutory search warrant, which can be demanded as matter of right.

I cannot subscribe to such a construction. True, section 873 makes it obligatory on the judge to grant the order upon the presentation of an affidavit complying in form with the requirements of section 872, and to this extent, the new code makes an important innovation. But when the order has been made, and the party to be examined comes into court, then the proceedings must necessarily be subject to judicial con-

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Opinion of the Court, by FREEDMAN, J.

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trol. If it were otherwise, if neither the judge nor the court have power to vacate for cause shown, if it were just as obligatory to take and complete the examination, as it is to grant the order in the first instance, then a party may take out as many successive orders against his adversary as he chooses, and have each time the same examination taken, certified, and filed, to the great oppression of his adversary ; or a plaintiff in an action in which there are fifty defendants, may be examined as to the same matters by each of the fifty defendants. For the same reason, it would follow that the examination can be compelled in an action for divorce on the ground of adultery for the purpose of extorting a confession, and that in all actions in which the defendant has so far been privileged from answering, his conscience may now be scraped until he does criminate himself ; for the section which prescribes the requisites of the affidavit makes no distinction in terms as to the class of actions to which the right of examination is to be confined, nor does the article containing the provisions under examination provide at what stage of the proceedings, or in what manner, a witness may assert the privilege accorded to him by other statutes. On the contrary, section 880, as already stated, provides that the judge taking the deposition must insert therein every answer or declaration of the person examined, which either party requires to be inserted.

It cannot be assumed, therefore, that the revisers intended to work the deplorable results which would flow from this helpless condition of the tribunals charged with the administration of justice. There is nothing in their notes showing any such intent. Their intention seems to have been to consolidate the provisions of law relating to the examination of a party by an adverse party ; the taking of depositions conditionally ; the perpetuation of testimony, and the

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Opinion of the Court, by FREEDMAN, J.

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taking of depositions by consent; and in carrying out this intention, their principal aim seems to have been to provide one mode of taking depositions in all these cases, and to remove unnecessary differences.

True, the power to vacate is not to be found among the provisions relating to these depositions. But the same objection might have been made to the provisions of the old code by which the right of examination was conferred, and yet the power existed, and its existence was never questioned.

Sections 877 and 878 of the Code of Remedial Justice, which preceded the New York Code of Civil Procedure for a short period, did provide for an application by any party to vacate the order, but on certain specified grounds only. In the discussions, however, to which said code gave rise, these grounds were deemed too narrow to allow an equitable discretion to be exercised, and hence, by the amendments of 1877, these restraints on the power of the court to vacate, were abolished by the repeal of the said two sections.

The truth is, that sections 870 to 886 of the Code of Civil Procedure constitute but a small part of a system of practice furnished by (1) the Code of Civil Procedure; (2) the unrepealed portions of the Old Code; (3) statutes not embraced in either, and (4) the rules and practice of the courts preserved by section 469 of the Old Code, so far as they are not inconsistent with later legislative enactments.

This system of practice must be considered and treated as one intended to be consistent throughout, and hence, if any section or part be intricate, obscure or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections or parts in the light of the general legislative intent disclosed by the whole system with respect to the intricate, obscure or doubtful point. Where there is clear and unambiguous evidence, says Mr. Justice COLE-

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RIDGE, that to withdraw a case from the operation of a section, is to fulfill the general intent of a statute, and also, that to adhere to the literal interpretation is to decide inconsistently with other and overruling provisions of the same statute, the court may properly act upon it, for the object of all rules of construction is to ascertain the meaning of the language used, and it would be unreasonable to impute to the legislature inconsistent intents upon the same general subject-matter. What it has clearly said in one part, must be the best evidence of what it has intended to say in the other. The court must apply in such a case the same rules which it would use in construing the limitation of a deed ; it must look to the whole context and endeavor to give effect to all the provisions, enlarging or restraining, if need be, for that purpose, the literal interpretation of any particular part.

So it was held, that when the meaning of any particular section or clause in the constitution is questioned, it is proper to look into other parts of the constitution ; otherwise the different sections might be so construed as to be repugnant to each other, and the intention of the makers might be defeated ; and if upon the examination of the general meaning and objects of the constitution, it should be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to the spirit of the act (6 *Cranch*, 307).

When, therefore, every part of this vast system of practice is brought into action, in order to collect from the whole the consistent sense of the particular sections now under examination, it will appear, not only that the power which inheres in every court of record, unless restrained by positive enactment, to vacate, on motion, its process, order or judgment, to prevent a perversion thereof, or to frustrate oppression (*Morgan v. Holladay*, 38 *N. Y. Superior Ct. R.* [6 *J. & S.*] 117),

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has not been impaired by the Code of Civil Procedure, but also, that section 772, which forms part of a title treating of motions and orders generally, and making general provisions for the same, confers the power to vacate an order in express terms. Under that section an order, in an action, made without notice, which grants a provisional remedy, can be vacated only in the mode especially prescribed by law, and *in any other case*, it may be vacated or modified without notice by the judge who made it, or upon notice, by him or by the court. The examination of a party before trial not being a provisional remedy within the meaning of that term as used in said section, the words in "any other case," which are used without any qualification whatever, clearly embrace an order made for such examination. Sections 873 and 876 must therefore be construed in connection with the general grant of power conferred by section 772 in confirmation of the power inherently possessed by the court, and in the light of the former practice of the courts, and when thus construed, all doubts as to the existence of the power to vacate must vanish. The examination must proceed if no motion be made to vacate the order, or the motion to vacate be denied. But the direction to proceed is not inconsistent with the exercise, for cause shown, of the power to vacate. This fully coincides with the general policy of the legislature upon the subject of these examinations, for while, as shown in *Winston v. English*, 44 *How. Pr.* 398, the legislature, representing the progressive power of the State, from time to time extended the right of discovery to new classes of cases and provided new remedies for securing it, it constantly looked to the courts as the representative power of the conservative element, for the prevention of the abuse of the letter of the law in individual cases.

The question then remains as to where and in what cases and under what circumstances the power to va-

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Opinion of the Court, by FREEDMAN, J.

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cate is to be exercised. Section 872 applies to all depositions which may be taken under the title of which it forms a part, whether of parties or witnesses, and it prescribes generally the requisites of the affidavit to be presented by the party desiring to take a deposition. In addition, the effect of the 89th rule of the General Rules of Practice enacted pursuant to the authority conferred by section 17 of the Code of Civil Procedure, is that the affidavit must in all cases specify the facts and circumstances which show the materiality and necessity of the examination.

If, therefore, the affidavit on which an order has been obtained is shown to be deficient in any necessary particular, the order may be vacated. The same result may take place if the allegations of the affidavit, though, sufficient by themselves, are successfully met by opposing proof. No precise rule can be laid down for all cases likely to arise. Each application to vacate must be determined upon the facts as they are made to appear. But so far as rules can be stated, the rules laid down in the case of *Winston v. English*, above referred to, may still be followed with safety.

The case at bar affords a striking illustration of the necessity of the exercise of the power. The plaintiffs, before the defendants' time to answer or appear had expired, obtained, upon their complaint and an affidavit, an order for the examination of two of the defendants. The complaint alleged a good cause of action with sufficient certainty, and the affidavit accompanying it, though alleging various facts, which, perhaps, would have justified the order in case the defendants had interposed a general denial, did not claim that the plaintiffs desired to amend their pleading, and that the examination sought was material and necessary to enable them to do so, but simply claimed that it was material and necessary for the plaintiffs in the prosecution of the action. But it is difficult to perceive how,



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at that stage of the case, it could be in fact material and necessary for the purpose alleged. No issue had been joined, and as long as it could not be seen what the issue would be, it could not be determined what the prosecution of the action required. Nor did the plaintiffs disclose any reason showing a special requirement. The defendants summoned showed, on the other hand, by affidavit, that some time prior to the commencement of this action the defendants had brought an action in the supreme court against the present plaintiffs; that in that action the present plaintiffs had set up by answer the cause of action now sued upon, and had procured an order for the examination of the defendants, and had actually examined one of them at considerable length on presumably the same issues as will arise in the present case, and that said examination had been finished and closed. This proof rendered it all the more necessary that the plaintiff should show affirmatively some clear and valid reason for proceeding with the examination in this action, but they failed to give any. The claim to which they finally resorted, that if the defendants should fail to answer, the examination of some of them would be necessary to enable the plaintiffs to obtain judgment on application to the court, is of too speculative a character.

The order appealed from should be reversed with costs, and defendants' motion to vacate the order for examination granted.

SPEIR, J., concurred.

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Appellant's points.

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JOHN J. CORBETT, PLAINTIFF AND RESPONDENT, v.  
LOUIS DE COMEAU, DEFENDANT AND APPELLANT.

I. *Practice.*

## 1. EXAMINATION OF PARTY TO ACTION BEFORE TRIAL.

## (a) LIBEL, ACTION FOR.

1. Defendant cannot be compelled to prove against himself the publication of the alleged libel, or to disclose any matter constituting a link in the chain of evidence, which may fasten the publication on him.

*Therefore, unless*

plaintiff shows that there are other matters as to which it is necessary and material to have the testimony of defendant before trial, *the order for his examination will be vacated.*

## A FORTIORI

Where plaintiff's papers show that the sole object of the examination is to prove by defendant that he published or caused to be published the libel, and do not show either that the examination is necessary for the framing of the complaint, or that the publication cannot be proved by other testimony.

## 2. RULE 89—REQUIREMENTS OF.

(a) *What does not satisfy them.*

1. A general affidavit "that the testimony of the defendant is material and necessary to plaintiff in the prosecution of his action," does not,

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

Appeal by defendant from order denying his motion to vacate an order for his examination after service of summons, but before service of the complaint.

*Coudert Brothers*, attorneys, and of counsel, for appellant.—I. 1. As to the general right to apply for a vacation of the order. It is elementary law that no

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Appellant's points.

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order can be granted which may not also be vacated. There was no provision in the old law for an application to vacate the order granted under section 391. And yet the application was constantly made and constantly granted. 2. Our particular right to apply for a vacation of the order herein. There is no provision in the new law for an application to vacate the order herein, nor was there any such provision expressly enacted under the old law, but the right to make such an application no one will deny.

II. 1. It is elementary law that a witness cannot be compelled to disclose any matter which may subject him to a penalty, a forfeiture or a criminal proceeding (*Henry v. Salina Bank*, 1 *N. Y.* 83; 1 *Phil. on Ev.* 278; *Mittf. Plead.* 197; 4 *Johns. Ch.* 482; 3 *Paige*, 533; 11 *Wend.* 329). Nor to discover any matter constituting evidence or a link in the chain of evidence which might subject him to a penalty, a forfeiture or a criminal proceeding (*Henry v. Salina Bank*, 1 *N. Y.* 86; *Matter of Tappan*, 9 *How.* 364; *People v. Maher*, 4 *Wend.* 254; 16 *Ves.* 242; *Parkhurst v. Lawton*, 2 *Swanst.* 215; 1 *Burr's Trial*, 244; *Southard v. Rexford*, 6 *Cow.* 254; *People v. Bellinger*, 8 *Wend.* 595). The proceedings under the code for obtaining an order for the examination of a party before trial corresponds to the bill of discovery in the old chancery practice (*King v. Leighton*, 58 *N. Y.* 383; *Glenney v. Stedwell*, 64 *Id.* 123). A bill of discovery does not lie to compel a party to discover facts, the effect of which might be to subject him to a penalty, forfeiture or criminal proceeding (*Chancery v. Tahourden*, August 4, 1742, before Lord Chancellor HARDWICKE. See also *Earl of Suffolk v. Green*, 1 *Atk.* 450; *Hamson v. Southcote*, 1 *Id.* 539; *Wrotterly v. Bendich*, 3 *P. W.* 238; *Chauncey v. Fenhoulet*, 2 *Ves.* 265; See also *Taylor v. Bruen*, 2 *Barb. Ch.* 301; *Conant v. Delafield*, 3 *Edw. Ch.* 201; *Sharp v. Sharp*, 3 *Johns. Ch.* 407; *Deas v. Harvie*, 2

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*Barb. Ch.* 448 ; *Leggett v. Postley*, 2 *Paige*, 599 ; *Currer v. Concord R. R. Co.*, 48 *N. H.* 321 ; *Lansing v. Pine*, 4 *Paige*, 639 ; 4 *Sim.* 263 ; *Marsh v. Davison*, 9 *Paige*, 580 ; *Bailey v. Dean*, 5 *Barb.* 297. See also 2 *Story's Eq. Jur.*, 822, and note ; *Taylor v. Bruen*, 2 *Barb. Ch.* 301 ; *McIntyre v. Mancius*, 16 *Johns.* 592). The court will not allow an examination to proceed where it is evident that the witness cannot be compelled to answer a single question under it (*Norton v. Woods*, 5 *Paige*, 269 ; *Burgess v. Smith*, 2 *Barb. Ch.* 276 ; *Dykers v. Wilder*, 3 *Edw. Ch.* 496). "The defendant cannot be compelled to answer a charge which, if true, will subject him to an indictment or expose him to criminal prosecution. . . . In this case there is no material fact alleged to be in the knowledge of the defendant which he could disclose without exposing himself to a prosecution for conspiracy, if the allegations in the complainant's bill are true" (*Leggett v. Postley*, 2 *Paige Ch.* 601 ; *Burgess v. Smith*, 2 *Barb. Ch.* 280 ; *March v. Davidson*, 9 *Paige*, 587). The last objection we have to meet is the one suggested, rather than expressed by the words "Such an objection is the personal privilege of the witness." There are cases which hold that the objection cannot be taken by counsel, but only by the witness himself. Any argument that may be drawn from these decisions is based upon the confusion which has arisen since parties have been allowed to testify in their own behalf. The rules which limited the privilege of witnesses before the innovation last mentioned, must be carefully examined before they are admitted as limiting the privilege of parties who offer themselves, or, as in this case, are forced upon the stand. It will be seen that in this class of proceedings there is an important distinction between them (See *Stake v. Andre*, 9 *Abb. Pr.* 420 ; *Palmer v. Adams*, 22 *How. Pr.* 375). A witness, not a party to the action, is not entitled to counsel. The decision, therefore, that counsel cannot object to a ques-

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tion on the ground of the personal privilege, cannot refer to the counsel of the witness, seeing that he was not entitled to one ; it cannot refer to the counsel for the party on whose behalf the witness is being examined, for he is the counsel who puts the question ; it can only refer therefore to the opposite counsel ; and the cases distinctly show this. The reason they lay down for the rule is, that one party is not to be shut off from the benefit of the testimony of his witness by a personal objection taken by the counsel for the other side. It was held, *Noyes v. Thayer*, 3 *Hill*, 566, that : "The court erred in compelling the witness to answer questions tending to criminate himself. But the error is not available to the plaintiff ; the privilege belongs exclusively to the witness, who may take advantage of it or not, at his pleasure. The party to the suit cannot object. The witness may waive the privilege and testify in spite of any objection coming from the party or his counsel" (See also *Ward v. Profer*, 6 *Hill*, 146 ; *People v. Bodine*, 1 *Den.* 566). But a party is entitled to counsel and to all the protection which a counsel can afford. This is recognized in the code by the express provision therein (§ 875), that "a copy of the order and of the affidavit upon which it was granted must be served upon the attorney for each party of the action." It is an instructive fact that the only proceeding by which a party could be compelled to testify at common law was by the assistance of a bill of discovery, and that a demurrer to this bill was continually taken by counsel on the very grounds upon which we base this argument, and the demurrer was sustained without a single exception.

*W. F. Severance*, attorney, and of counsel, for respondent:—I. The new code, section 870, *et seq.*, gives every party to a suit the absolute and unqualified right in every case to examine the adverse party

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before trial, on the presentation of an affidavit stating certain facts. No distinctions are made in the kind of actions, or exceptions to the rule. The language is broad, and it is made compulsory, by section 873, on a judge on the presentation of an affidavit, to grant an order if an action is pending; and section 876 is mandatory that he must proceed with the examination on proof of service. The only point really to be considered then, is whether the affidavit was sufficient; as if so, the right to the examination was absolute, although the right to compel defendant to answer all questions after he was sworn, might not be.

II. The defendant has laid much stress on the case of *Phoenix v. Dupuy* (2 Abb. N. C. 146), which was made before the new code went into effect, and was based on the theory that a bill of discovery would not lie in such a case. It is difficult to see what application a discussion on bills of discovery has to the right of examination under the new code. It may be known to this court, as it is to the bar of the city, that the judges of the court of common pleas have allowed very few examinations of parties before trial, and have termed such examinations "fishing excursions," and "scraping the conscience of the adverse party," and that little weight has been given to the decisions of that court on this subject. The theory of hardship, which has always been strongly advanced in that court, and which has there been very efficacious, has been disposed of a number of times (*Glenney v. Stedwell*, 64 N. Y. 120; *Ludewig v. Pariser*, decision of Judge SANFORD, March 19, 1878).

III. If Judge SANFORD had decided that this examination should not be allowed, on the crimination theory, he would practically have assumed that the answers to all of the questions asked would have a tendency to criminate, and further, that the witness would claim his privilege and refuse to answer. For

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all that was known, he might waive his privilege and testify. It has been often decided that the court will only interfere when a witness claims his privilege, and will not instruct him in advance. The privilege is exclusively a personal one (*People v. Bodine*, 1 *Den.* 314; *Fellows v. Wilson*, 31 *Barb.* 163; 3 *Hill*, 566; 6 *Cow.* 260; 6 *Hill*, 144; *Corbett v. De Comeau*, opinion in this case; *Ludewig v. Pariser*, *supra*).

IV. The affidavit is sufficient. It follows the statute. The only pretense of an omission that can be suggested, is that it does not state "the judgment demanded therein." This, however, evidently refers to a case where a complaint has been served with a demand for judgment, as there could, under the circumstances here, be no "judgment demanded therein." In a libel action, but one judgment is demanded, to wit: damages. See *Beach v. Mayor*, *supra*, where it is held that a substantial compliance is all that is required.

BY THE COURT.—FREEDMAN, J.—The existence of the power to vacate an order made for the examination of a party at the instance of the adverse party, has been so fully shown in *Levy v. Loeb*, decided at the present term of this court, that no further discussion upon that point is necessary here. In so far, therefore, as the denial of the motion was based upon a supposed want of power, it rests upon an erroneous view of the law.

The defendant, on the return day of the order, objected to being sworn, and moved for the vacation of the order, on the ground, among others, that the action being for libel, he could not be compelled to prove against himself the publication of the alleged libel.

The rule that a witness cannot be compelled to disclose any matter which may subject him to a penalty, a forfeiture or a criminal proceeding, nor to disclose

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any matter constituting a link in the chain of evidence which may subject him to any of these consequences, has not been repealed by the Code of Civil Procedure, but is expressly retained by section 837. But it is the personal privilege of the witness, and ordinarily it can only be urged when a question having that tendency is addressed to him. As a general rule, therefore, the premature assertion of the privilege affords no justification for refusing to be sworn.

On the other hand, it was incumbent on the plaintiff to demonstrate by facts and circumstances the materiality, necessity and good faith of the proposed examination at the particular stage of the case at which it was sought to be taken. When, therefore, the defendant claimed his privilege, the plaintiff should at least have shown that there were material matters as to which the defendant could be examined. The burden of proof upon this point rested upon the plaintiff from the start, especially as, under the former practice, as was also insisted upon by the defendant, no bill of discovery would have been sustained for the purpose sought to be accomplished by the examination (*Leggett v. Postley*, 2 *Paige*, 599; *Marsh v. Davison*, 9 *Id.* 580; *Bailey v. Dean*, 5 *Barb.* 297; *Lansing v. Pine*, 4 *Paige*, 639; *Taylor v. Bruen*, 2 *Barb. Ch.* 301; *McIntyre v. Mancius*, 16 *Johns.* 592), and no examination was allowed to proceed where it was evident that the witness could not be compelled to answer a single question under it.

But the affidavit on which the order was granted showed that the sole object of defendant's examination was to prove, by the latter's own oath, the publication of a letter libelous on its face in a newspaper, with the design to injure the plaintiff, and no further proof was adduced to overcome defendant's objection. Moreover, there was no pretense that the examination was material and necessary to enable the plaintiff to frame

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Statement of the Case.

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his complaint, or that the publication could not be proved by other testimony, if such proof should become necessary at a subsequent stage. The mere general averment of the affidavit, "that the testimony of the defendant is material and necessary to plaintiff in the prosecution of this action," did not meet the requirements of the 89th rule.

For these defects, and it plainly appearing from the whole case that the object of the plaintiff was not so much to collect proof in aid of an action which he had, as to find out by the examination of the defendant whether he had any against the latter in particular, the motion to vacate should have been granted. To have compelled the defendant to take the oath and then to reassert his privilege, would in this case have been an idle ceremony.

The order appealed from should be reversed with costs, and defendant's motion to vacate the order for examination granted.

SPEIR, J., concurred.

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HERBERT B. FREEMAN, PLAINTIFF AND RESPON-  
DENT, v. HENRY M. BARROWCLIFFE, IM-  
PLEADED, ETC., APPELLANT.

II. JOINT DEBTORS.

1. *Chapter 2, title 12, part 2, of old code, proceedings under*, by summons to show cause why a defendant not served (the others being served) should not be bound by the judgment entered in form against him with the others.

(a) WHEN NOT APPLICABLE.



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Statement of the Case.

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1. *Fictitious name.*—An action was brought against two persons alleged to be joint debtors. One was sued by a fictitious name. He did not appear. The other appeared and defended. The judgment record showed a full and absolute judgment entered upon a *personal service of the summons and complaint on the person designated by the fictitious name*, and upon verdict as to the other, **HELD, THAT THE CHAPTER DID NOT APPLY,**

*Because—*

1. If the person summoned to show cause is the one designated by the fictitious name, then the record showed a full and absolute judgment against him already.

(a) If desired to obtain a judgment against him by his true name, the proper proceeding is under section 451 of the new code.

2. If the person summoned to show cause is not the one designated by the fictitious name, then he is not a party to the action.

(a) If he is a third joint debtor, whose name for some cause was omitted from the original summons, the remedy is under subdivision 4 of section 136 of the old code.

(b) *Plaintiff's proceedings.*

1. **AFFIDAVIT NECESSARY.**

1. The summons must be accompanied by an affidavit of the persons subscribing it, that the judgment has not been satisfied, and specifying the amounts due them.

(c) *Pleadings by person summoned.*

1. **DEMURRER IS NOT ALLOWED; THE ONLY PLEADING HE IS ALLOWED TO INTERPOSE IS AN ANSWER.**

**Before SPEIR and FREEDMAN, JJ.**

*Decided November 4, 1878.*

Appeal from order overruling demurrer

The action was brought against John M. Falconer and Richard Roe, whose real name was unknown to the plaintiff, composing the firm of John M. Falconer & Co., as makers of two promissory notes.

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Appellant's points.

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The defendant John M. Falconer appeared and answered, and a verdict having been rendered against him, judgment was entered and perfected against both defendants.

Subsequently the appellant Henry M. Barrowcliffe, was served with a summons requiring him to show cause why he should not be bound by said judgment. He thereupon demurred to the complaint in the action on the ground that it did not set forth facts sufficient to constitute a cause of action as against him.

The court at special term overruled the demurrer with costs to the plaintiff, and adjudged Barrowcliffe bound by said judgment, unless he should withdraw the demurrer, pay the costs and serve an answer to the complaint in said action.

From that order the present appeal is taken.

*Thomas & Wilder*, attorneys, and of counsel, for appellant:—I. There is no pretense that “Richard Roe,” in the judgment herein, is the designation of a plurality of persons. The complaint alleges that he is a unit; the *postea* shows that he has already been served with the summons and complaint herein, and has put in no defense thereto; the judgment, therefore, is already as perfect as it can be made. No other defendants remain to be brought in. If Henry M. Barrowcliffe and “Richard Roe” are one and the same person, then the record should be amended accordingly.

II. But if Henry M. Barrowcliffe and “Richard Roe” are indeed identical, this demurrer is good on another ground. For it then appears by the judgment itself, which is already perfected against “Richard Roe,” that the plaintiff already has a judgment against Barrowcliffe, and all he need do is to amend his record in the manner provided by section 451, by substituting therein the name of Barrowcliffe for that of Roe, and then enforce his judgment. There is certainly no

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authority for requiring Barrowcliffe to show cause why he should not be bound by a judgment which already runs against him on that hypothesis. It is as if "Richard Roe" were sued over again upon a complaint on which judgment has already been rendered against him, and falls within the criticism of Judge BRADY in *Johnson v. Smith* (14 Abb. 423). The objection appearing upon the face of the record, it can be taken by demurrer.

III. Plaintiff, therefore, must abandon the hypothesis that "Richard Roe" and Henry M. Barrowcliffe are one and the same person. But this abandoned, it follows that Barrowcliffe is a third party, not named in the original summons and complaint, and as to him therefore the complaint discloses no cause of action whatever, and is clearly demurrable.

IV. It was suggested below that Barrowcliffe's remedy is restricted by section 379 (old code) to an answer, and that he cannot demur. But an answer includes a demurrer, as the greater always includes the less (See *Brodhead v. Broadhead*, 4 How. 308). His defense is simply, "Your complaint shows a cause of action against John M. Falconer and 'Richard Roe.' Your record shows service and recovery against both of them. You show, therefore, nothing against me." The plaintiff cannot reply to this that Barrowcliffe must demur to the complaint alone, for the plaintiff has required him to show cause why he should not be bound by the judgment, *i. e.*, the whole record. Whatever defenses therefore appear on the face of the whole record are available on demurrer. It would certainly be idle to require Barrowcliffe to set up by way of answer, a defense which he would only have to put in the plaintiff's own judgment-record to prove.

*C. F. Wells*, attorney, and of counsel, for respondent:—I. There is no provision for any such pleading

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as a demurrer to the complaint in such cases. (a) I quote section 379 of the old code, which is the only law upon this point of practice: "Upon such summons any party summoned may answer within the time specified therein, denying the judgment or setting up any defense thereto which may have arisen subsequent to such judgment; and in addition thereto if the party be proceeded against, according to section 375, he may make any defense which he might have made to the action if the summons had been served on him at the time when the same was originally commenced, and such defense had been then interposed to such action."

II. Even if a demurrer were allowable, as included in the term defense in the section, yet the demurrer to be good must be, by the express restrictions of the statute, one that would have been good at the time when the action was originally commenced, had it been then interposed. (a) I submit that the complaint contains a complete cause of action against the people who composed the firm of J. M. Falconer & Co., and that this demurrer, if interposed in the original action, would have been held frivolous. (b) The argument made at the special term that the name of Barrowcliffe becoming known, it is necessary (*Code*, 451) at once to insert it in the place of one or more of the fictitious names used, is absurd, when we consider that the demurrer admits all facts stated in the complaint, prominent among which is the allegation that the defendants' real names are unknown to plaintiff.

BY THE COURT.—FREEDMAN, J.—The summons requiring Barrowcliffe to show cause why he should not be bound, was issued pursuant to section 379 of the old code, which forms part of a chapter relating to proceedings against joint debtors, &c., &c., and remaining still in force, notwithstanding the enactment of the new code.

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By section 375 of the said chapter, it is provided that when a judgment shall be recovered against one or more of several persons, jointly indebted upon a contract, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. But such remedy is, by the same section, expressly confined to cases in which judgment has been recovered against one or more of several joint-debtors, by proceeding as provided in section 136. On turning to that section, it will be found to regulate plaintiff's proceedings in cases where the action is against two or more defendants, and the summons was served on one or more of them, *but not on all of them*. The remedy, therefore, exists only when one of several persons jointly indebted upon contract, has been named in the original summons and the complaint as a party defendant, but has not been served. In such a case, he may be summoned to show cause why he should not be bound, and then the summons is to be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, and specifying the amount due thereon (§ 378).

In the case at bar, no affidavit accompanied the summons. In addition, it appeared by the judgment-roll, that the summons and complaint in the action had been served upon both John M. Falconer and Richard Roe, constituting the firm of J. M. Falconer & Co., and that judgment had been fully perfected against both defendants, so as to bind both their joint and several property. For these reasons, the appellant should not have been summoned at all under section 379.

For if it be claimed that the plaintiff was originally ignorant of the name of the defendant, who, together with John M. Falconer, composed the firm of J. M.

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Falconer & Co., that for such reason he designated such defendant by the name of Richard Roe, that the summons and complaint were served upon the appellant under the said designation, and that he subsequently discovered the true name of the defendant so designated and served to be Henry M. Barrowcliffe, he should, upon proof of these facts, have applied under section 451 of the new code for an amendment of the summons, complaint, and judgment-roll, by the insertion of the true in place of the fictitious name.

If, on the other hand, it be claimed that Barrowcliffe was an additional partner with the defendants named in the judgment, that as such he is jointly liable with them, but that for some cause his name was omitted in the original summons and complaint, plaintiffs' remedy is by action, as provided by subd. 4 of section 136, above referred to.

It therefore remains to be seen whether the appellant was regular in availing himself of a demurrer to get rid of plaintiffs' unauthorized proceeding.

Under section 379 he had the right, by answer, to deny the judgment, or to set up any defense thereto which arose subsequently to the judgment, and in addition, to make any defense which he might have made to the action if the summons had been served on him at the time when the action was originally commenced, and such defense had then been interposed to such action. This does not authorize a demurrer in terms. Nevertheless, if the proceeding were an action, and if no special reasons existed in favor of a different construction, I should incline to the opinion that the word "defense" includes a demurrer. The word answer is used in the old code in this extended sense on several occasions, and a demurrer is, in effect, an answer that the party demurring will go no further, because the other has shown nothing against him.

But the code does not treat this proceeding as an

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action. It directs the judgment to be given *in the same manner as in an action*, thus negating the idea that there is an action, and for the same reason, it makes special provisions for the form of the summons and its service, and for the pleadings, and the mode of enforcing the judgment. It sedulously avoids calling the parties plaintiffs and defendants, dispenses with any new complaint, and makes the summons not for the payment of money, or for relief, but to show cause (*Mills v. Thursby*, 2 *Abb. Pr.* 432).

Section 379 then provides that cause shall be shown by answer, and when that is done, the party issuing the summons may, under section 380, demur or reply to the answer, and the party summoned may demur to the reply.

The statute, therefore, upon which this special proceeding depends exclusively, makes careful distinction between an answer and a demurrer, and expressly limits the use to which they, or either of them, may be put in the cases arising under the statute.

From this it follows that the word "answer," occurring in section 379, must be taken in the restricted sense in which it has evidently been used, and that the appellant was not authorized to interpose a demurrer.

For the reason last stated, the order should be affirmed with costs, but with leave to appellant to withdraw said demurrer and answer, upon payment of such costs, and of the costs of the special term.

SPEIR, J., concurred.

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Statement of the Case.

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WILLIAM H. WOOD, PLAINTIFF AND APPELLANT,  
v. THE MAYOR, &c. OF THE CITY OF NEW  
YORK, DEFENDANT AND RESPONDENT.

I. EXCESS OF POWER.

1. When exercise of *does not invalidate* that which falls within the power.

(a) Where that which is authorized neither depends on nor is a mere incident to, nor flows out of that which is in excess.

II. OFFICER, SALARY OF.

1. Liability of corporation of the City of New York.

(a) Not liable where there has been *no performance* of the duties of the office.

III. NEW YORK CITY AND COUNTY.

1. *Fire Department.*

(a) SENTENCE OF BOARD OF FIRE COMMISSIONERS, EFFECT.

1. While section 85, ch. 137, *Laws* 1870, was in force, a fireman was tried on, and found guilty of, a certain charge preferred against him, and the board of fire commissioners sentenced him to be "retired from active service on an annuity of \$150, to date from 12th inst."

Held,

1. Though the board may not have power to grant the annuity, yet its action in retiring the fireman was valid and operative.
2. The sentence of retirement was in substance and effect one of discharge and dismissal from the service.
3. That the fireman not having performed any service after such discharge, was not entitled to the salary attached to the position of fireman thereafter accruing.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

Plaintiff was appointed a foreman in the Fire Department of the city of New York in 1865. In August, 1872, a certain charge was preferred against him. He was tried on the charge before the committee on discip-



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Appellant's Points.

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line of the fire department. The committee found him guilty, and its sentence was that his resignation be demanded. The trial was reopened, when he was again found guilty by the committee, and sentenced to be retired from the service of the department on an annuity of \$150, to date from September 12, 1872. On the action of the committee being reported to the board of fire commissioners, the action taken by that body on September 11, 1872, thus appears in its minutes: "On motion, William H. Wood of Engine Company No. 33, was retired from *active* service in the department on an annuity of \$150, to date from the 12th instant."

He was paid his salary up to November 1, 1872. He performed no duty and was not recognized as a fireman after September 11, 1872.

This action was brought to recover the salary from November 1, 1872, to March 1, 1875. The salary of a foreman is fixed by law.

The judge presiding at the trial of the action directed a verdict for plaintiff for the full amount of his claim; but the learned judge afterwards, on a motion to set aside the verdict, rendered a decision setting it aside, and ordering a new trial. An order was entered in conformity with this decision, from which plaintiff appeals.

*I. H. & N. L. Vanderzee*, attorneys, and of counsel for appellant:—I. The plaintiff was not dismissed, and is therefore entitled to his pay, and the verdict should not have been disturbed. The sentence passed upon the plaintiff on September 11, 1872, did not dismiss him from the service. He was simply retired from active service. The latter portion of the motion, providing for an annuity of \$150, was illegal, inoperative, and void. The board had no power to grant an annuity in this case. This being so, all that remains of

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Appellant's Points.

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their sentence is, that plaintiff was retired from active service in the department. There being no law fixing the salary of retired officers, the salary must remain the same as that of active officers.

II. But the entire action of the commissioners was unauthorized and void. They had no power to retire the plaintiff from active service, nor power to grant him an annuity. Their whole action was a nullity, without force or vitality. The board was organized under an act passed March 30, 1865, and their powers and duties concerning removals were defined by that act, as follows: "The said commissioners shall have power to select . . . as many officers, clerks, firemen and appointees as may be necessary, and the same shall be at all times under the control of said commissioners, . . . and may be removed by said commissioners" (Section 14 of said act). This power resided in the commissioners arbitrarily, and could be exercised for cause or without cause. Where arbitrary power is conferred by the legislature it must be strictly enforced, for no presumption of discretion is permissible (*Heywood v. City of Buffalo*, 14 *N. Y.* [4 *Kernan*], 537, &c.). The sentence imposed upon the plaintiff in none of its parts is in accordance with the statute authorizing the fire commissioners to remove its subordinates, and therefore is not a sentence which they could impose.

III. It cannot be successfully insisted that the sentence imposed upon the plaintiff was intended, or is in effect a sentence of removal. (a) Because the power lodged in the commissioners being arbitrary, their action must literally comply with the terms of the act conferring it, and wherever their action fails so to literally comply with the act, it is void, and as though it had not been uttered. (b) Because the facts show that the commissioners had no such intention. After an investigation of the charges made against the

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plaintiff, the committee on discipline proposed a sentence retiring him from the service of the department. This sentence was never confirmed by the board of fire commissioners. They, in effect, decided not to dismiss him, as the committee proposed, but simply to retire him from active service in the department. They do not remove him from the department, and as they were, in effect, recommended by the committee on discipline to dismiss him, but, instead of following that recommendation, modify the sentence, the plain inference is, that they did not intend to dismiss him, as they were recommended to do by the committee.

IV. Certiorari will not, for the reasons above stated, lie. In any event certiorari is needless. Certiorari is needed only where the decision affects a substantial right; but where the finding is void—where it does not affect a substantial right—certiorari is needless (*Heywood v. City of Buffalo*, above cited). The action of the fire commissioners does not affect the plaintiff. 1st. It is void. 2d. There is not a word in that sentence which affects the pay of the plaintiff.

V. The board of fire commissioners, as organized by law at the time of the action complained of by the plaintiff, was not constituted as the present board is. In the case of the present board, which is, in effect constituted a judicial body, it might have been necessary to resort to certiorari; but the board whose action we are now considering, was not, either in fact or in effect, a judicial body, or invested with the semblance of judicial authority, and their proceedings were not the subject of certiorari.

*Wm. C. Whitney*, counsel to corporation, with *D. J. Dean*, of counsel for respondents:—I. The power of the commissioners to discharge the plaintiff is not contested; but it is contended that their order that he be retired from service is not a discharge. The defend-

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Respondent's Points.

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ants argue that retiring the plaintiff from service was an effectual discharge. The retiring was absolute, unconditional, and unlimited. The plaintiff was thereby relieved the control and discipline of the board of commissioners, and could no longer be commanded or assigned to duty by them. He ceased to be a fireman, and could no longer exercise authority in the department. He was at liberty to engage in other employment, and was completely released from any claim of the fire department to his time or service. No element of discharge was wanting when he was unconditionally retired from service.

II. The plaintiff, not having performed service, cannot recover the compensation attached to the office. Title to the office alone will not sustain a claim for the salary, even when the officer has been excluded by the unauthorized or wrongful act of the commissioners. The act of the commissioners may have resulted in preventing the plaintiff from enjoying the opportunity to earn the salary of a fireman; for such a wrong, the law will supply an appropriate remedy against the wrongdoer. But the city is only obliged to pay salaries when, having possession of the office, the officer has performed such service as was necessary. No contract exists between the plaintiff and the defendants, by which the defendants are obliged to pay the salary, whether the plaintiff exercises the duties of the office or not. The court of appeals has already had occasion to examine the question as to the right of a public officer to draw from the public either salary or fees, when no services have actually been rendered. In the first of these cases, Judge RUGGLES, delivering the opinion of the court, expressed himself as follows: "The right to the compensation arose out of the rendition of the services, and not out of any contract between the government and the officer that the services shall be rendered by him" (Connor v. Mayor,

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Opinion of the Court, by FREEDMAN, J.

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&c., 1 *Seld.* 285). This opinion was recognized and reaffirmed in the later case of *Smith v. Mayor*, 37 *N. Y.* 518. See also *McVeany v. Mayor*, 1 *Hun*, 37.

BY THE COURT.—FREEDMAN, J.—The board of fire commissioners, as organized by law at the time of the action complained of by plaintiff, was not constituted as the present board is. The present board has no power to make removals except in the manner prescribed by the charter of 1873; but the former board, it is conceded, had power to appoint and remove firemen at pleasure (*Laws* 1870, ch. 137, § 85).

In 1872 the plaintiff was a foreman of a fire engine company in the fire department of the city of New York, at a salary of \$1,500 per annum. As such he was, during said year, tried upon a certain charge, found guilty, and sentenced by the board of commissioners to be retired from active service in the department on an annuity of \$150.

The board may have had no power to grant the annuity, but from the fact that one was granted, it does not follow that the whole of the sentence was illegal. The unobjectionable part of it operated as a discharge and relieved the plaintiff from the control and discipline of the board. He could no longer exercise authority in the department, and he could no longer be commanded or assigned to duty as a fireman. He was at liberty to engage in other employment, and completely released from any claim of the fire department to his time or services. And as matter of fact he subsequently never was called upon to perform any duty, or recognized as a fireman.

This being so, and the plaintiff not having performed the duties of the office since that time, it is difficult to perceive how he can recover the compensation which would have attached if he had performed the duties. The corporation of the city of New York is only liable to pay such compensation when the officer, hav-

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Statement of the Case.

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ing possession of the office, has performed the necessary services. No contract exists between the plaintiff and the corporation, by which the latter is bound to pay the salary irrespective of the question whether the plaintiff exercises the duties of the office or not. In a case like the present, the right to the salary arises out of the rendition of services, and not out of any contract between the government and the officer that the services shall be rendered by him (*Conner v. Mayor, &c.*, 1 *Seld.* 285; *Smith v. Mayor, &c.*, 37 *N. Y.* 518;\* *McVeany v. Mayor, &c.*, 1 *Hun*, 35).

The order setting aside the verdict and ordering a new trial must be affirmed with costs.

SPEIR, J., concurred.

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CHRISTIAN F. HOLTZ, PLAINTIFF AND RESPONDENT, v. HENRY G. SCHMIDT AND EMIL CUNTZ, DEFENDANTS AND APPELLANTS.

NEW TRIAL.

1. Perjury of witness called on behalf of successful party, motion for new trial.

(a) *General rule as to.*

1. CONVICTION FOR PERJURY necessary before a motion for a new trial will be granted on the ground of perjury of a witness.

(a) EXCEPTION TO RULE, WHAT DOES NOT FORM.

1. *Voluntary confession* of his perjury, and an affidavit of the witness to that effect, does not,

ESPECIALLY

where one of the unsuccessful parties made admissions on the trial to about the same effect as the testimony of the witness sought to be falsified.

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\* NOTE. Compare *Dolan v. Mayor, &c.*, of New York, 68 *N. Y.* 274.

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Appellant's points.

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Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

Appeal by defendants, from an order denying defendants' motion for a new trial made on a case, exceptions and affidavits.

The motion was heard before the Hon. JOHN SEDGWICK, who delivered the following opinion :

“SEDGWICK, J.—The case of *Fabrilis v. Cook* (3 *Burr.* 1771), does not support the present application. In that case many circumstances were shown to have been falsely sworn to, and the decision may have been placed as well upon surprise as any ground ; at any rate it was not placed upon the ground that a witness on the trial made an affidavit that his testimony was false. The utmost that is certain in such a case is that he is not a credible witness when he makes the affidavit. In this case one circumstance peculiarly enforces the general rule, that there must have been a conviction before a motion for a new trial on the ground of perjury will be granted. It is apparent that the affiant is not to be proceeded against for his alleged perjury, and he makes the affidavit with the belief that he will not be prosecuted by the defendants. So much the easier for him to furnish the affidavit. The motion is denied with costs.”

*Tracy, Olmsted & Tracy*, attorneys, and *Dwight H. Olmsted*, of counsel, for appellant, on motion for new trial.—I. The conviction of a witness of perjury on an indictment, is not a necessary preliminary to a motion for a new trial on that ground (*Fabrilis v. Cook*, 3 *Burr.* 1771). In *Williams on New Trials*, the learned editor, after citing the cases in which it has been held that a conviction was necessary, remarks :

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“Probably, however, the practice on this subject is much less rigid than these cases would indicate” (*Hilliard on New Trials*, 505, § 23 [2d ed.]). “New trials have been frequently granted where there has been strong reason to suspect that perjury has been committed” (WESTON, J., 1 *Me.* [1 *Greenl.*] 322).

II. The confession of perjury by a witness should induce the court to consider favorably a motion for a new trial; especially as the granting of the motion is a matter of discretion with the court (*Donley v. Graham*, 48 *N. Y.* [3 *Sick.*] 658; *Tyler v. Hornbeck*, 48 *Barb.* 197).

*Charles Wehle*, attorney, and of counsel, for respondent, among other things, urged:—I. The legal presumptions are, that the statement given by the witness in his affidavit, rather than the testimony given in open court, was false (*Steinbach v. Columbian Ins. Co.*, 2 *Cal.* 129; *Jackson v. Bowen*, 3 *Johns. Ch.* [2d ed.] 596).

BY THE COURT.—FREEDMAN, J.—The motion for a new trial, on the case and exceptions, and certain affidavits imputing perjury to one of plaintiff's witnesses, was properly denied for the reasons assigned by the learned judge below. Upon the case as made, and especially in view of the admissions made at the trial by the defendant Schmidt, which were to about the same effect as the testimony of the witness which is now sought to be falsified by a mere affidavit, the legal inference is, that the subsequent statement in the affidavit of the witness rather than his testimony given at the trial, is false.

The order appealed from should be affirmed, with costs.

SPEIR, J., concurred.



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Statement of the Case.

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WILLIAM K. HINMAN, ET AL., PLAINTIFFS AND  
APPELLANTS, v. STEPHEN O. RYDER, DEFEND-  
ANT AND RESPONDENT.

I. EXTRA ALLOWANCE.

1. *What not sufficient ground for.*

(a) PARTNERSHIP ACCOUNTING AND DIVISION OF ASSETS.

1. The bare fact that an action is brought for an accounting between partners, and a division of the partnership assets, is no ground for the granting of an extra allowance. In such case the element that the action is difficult and extraordinary, must exist to authorize an allowance.

(a) DIFFICULT AND EXTRAORDINARY.

1. *What will not so characterize such an action as to justify an extra allowance.*

1. Where, if the action is difficult and extraordinary at all, it is so by reason of issues joined on charges of misconduct and bad faith made by plaintiff against defendant, and those charges are subsequently abandoned, an extra allowance cannot be granted to the plaintiff.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

Appeal by plaintiffs from an order of the special term denying their motion for an allowance under section 309 of the code.

The order recited as the reason for the denial: "That the court has not the power to grant an allowance under said section in such a case as that presented by the pleadings in this action."

*Brown & Pease, for appellants.*

*John Henry Hull, for respondent.*

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Opinion of the Court, by FREEDMAN, J.

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BY THE COURT.—FREEDMAN, J.—The action was brought by the plaintiffs as the special partners, against the defendant as the general partner, of a partnership, for an accounting between them, and the division of the partnership property according to their respective rights. The partnership was a limited one, under the laws of the State of New York, and at the time of the commencement of the action it had expired by its own limitation.

The complaint, in addition to the averments usual in such cases, contained charges of misconduct and bad faith against the defendant as general partner, which provoked an answer and raised issues collateral to the main question, but on the accounting it appeared that the capital contributed by the plaintiffs as special partners remained unimpaired, that each of them had already received his full share of the profits to which he was entitled, and that the actual profits had been more than sufficient to pay them. It was, therefore, stipulated between the parties that the plaintiffs should claim no personal judgment against the defendant, and that the defendant should claim no personal judgment against the plaintiffs, and the whole litigation finally resulted in an adjudication that out of the remaining partnership property each of the plaintiffs should receive and be paid the capital specially contributed by him respectively, that the defendant was entitled to whatever might remain thereafter, and that neither of the partners should be allowed interest on the accounting.

Under these circumstances the plaintiffs should not have an extra allowance in addition to the ordinary costs of the action, which were awarded to them. If the action was a difficult and extraordinary one within the meaning of section 309 of the code, it was only so for a time by reason of the advancement by the plaintiffs of claims which were subsequently withdrawn. But

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so far as the simple division of the partnership property was concerned, the defendant had as much right to bring the action as the plaintiffs possessed, and hence the bare fact that the action was commenced by the plaintiffs, affords no just reason why they should be rewarded with a special allowance out of the common fund. An action for the partition of land stands upon a different footing, and the allowance is regulated by a special provision.

The plaintiffs not being entitled to an allowance upon the facts of the case, it is not necessary to determine the precise power of the court upon this point and in this class of cases. The decision below being right, the reason assigned for it is immaterial.

The order should be affirmed with costs.

SPEER, J., concurred.

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ANDREW J. PERRY, RECEIVER, &C., PLAINTIFF  
AND RESPONDENT, v. HENRY VOLKENING,  
LUDWIG G. GLOECKNER, AND OTHERS, DE-  
FENDANTS AND APPELLANTS.

I. *Injunction.*

1. PRIMA FACIE CASE, FOR, WHAT IS NOT.

- (a) The preliminary injunction was obtained on the ground that an assignment made by Volkening was fraudulent as against certain creditors represented by the receiver. The fraudulent character of the assignment was sworn to on information and belief, no facts were stated from which the conclusion could be drawn and the sources of information were not given; and for all that appeared the judgment under which the receiver was appointed might have been recovered on cause of action which arose subsequent to the

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Appellants' points.

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assignment, not on contract. In addition to this there were two affidavits read on behalf of the defendants as to the *bona fides* of the assignment.

*Held,*

that a *prima facie* case for an injunction had not been presented.

Before SPEER and FREEDMAN, JJ.

*Decided November 4, 1878.*

On April 8, 1876, Henry Volkening deposited in the New York Life Insurance & Trust Company, \$4,000, to the credit of a certain action to which he was defendant, as additional security on an appeal taken by him.

The plaintiff in this action on February 9, 1878, obtained a preliminary injunction restraining defendants from demanding or receiving said money, and an order requiring them to show cause why they and all persons on their behalf, should not be restrained and enjoined from demanding or receiving the said moneys during the pendency of this action, and why said Volkening should not make an assignment of the same, or so much thereof as might be required to pay the judgments upon which the plaintiff herein was appointed as receiver; and for such other or further order as is proper.

On the return of the order to show cause, affidavits were read to the effect that said Volkening, on June 3, 1876, assigned said sum to defendant, Ludwig G. Gloeckner, to secure a balance of \$7,500 due him.

At special term an order was made "that the said order of February 9, 1878, granted on the application of the plaintiff, be continued in full force and effect," and denying a motion made by defendant's to vacate that order.

This appeal is from the special term order.

*Nelson Smith*, attorney, and of counsel, for appellant.—I. Fraud must be proved and cannot be pre-

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affidavits and in detail, that the assignment was *bona fide*, and made for a good and valid consideration.

It was also shown that the assignment was made June 3, 1876, that the judgments against Volkening were recovered in the marine court, June 22, 1876, and that plaintiff was appointed receiver October 10, 1876.

But there was no allegation or proof that on June 3, 1876, the causes of action existed for which the judgments were subsequently recovered, nor did the grounds of the recovery appear. For all that appeared the judgments might have been recovered upon causes of action which arose subsequent to the date of the assignment, and not upon contract.

Upon the whole case, therefore, the plaintiff had failed to present a *prima facie* case entitling him to an injunction on the ground of fraud against creditors, and in the exercise of a sound discretion the motion for the continuance of the injunction during the pendency of the action should have been denied.

The soundness of the views here expressed has, since the argument of the present appeal, been confirmed upon the trial of the issues, which resulted in the final establishment of the good faith and validity of the assignment.

The order should be reversed, with costs.

SPEIR, J., concurred.

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Statement of the Case.

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**ELIZABETH SWEENEY, PLAINTIFF AND RESPOND-  
ENT, v. ROBERT PRIOR, DEFENDANT AND AP-  
PELLANT.**

**I. Payment.—Presumption of.**

**1. TRANSFER OF PROPERTY.**

*(a) When presumed to be given in payment.*

1. Only when made at the time of the creation of the indebtedness.

*(b) When presumed not to be given in payment.*

2. When the transfer is made after the creation of the indebtedness.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

The action was brought to recover a balance of \$597, for goods sold and delivered, and for certain disbursements.

Defendant denied the claim, and alleged:

That the goods were sold to one Guilfoyle, who had a contract with the corporation of the city of New York for the improvement of One hundred and fifty-second street; that Guilfoyle being indebted to defendant, and desiring loans for the prosecution of the work, assigned said contract to defendant as security only; that the payments made by defendant to plaintiff were made on behalf of Guilfoyle, of all which facts plaintiff had knowledge; and that by an assignment of thirty per cent. of said contract, defendant on behalf of Guilfoyle paid plaintiff in full.

Upon the trial, testimony was given on both sides, and defendant's motion for a non-suit and the direction of a verdict in his favor were denied, to which rulings defendant excepted.

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Opinion of the Court, by FREEDMAN, J.

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In substantiation of defendant's version, and to show that credit was given to Guilfoyle, the defendant introduced a note made by Guilfoyle to defendant's order and indorsed by defendant to the plaintiff, for the sum of \$853.93, and also a receipt by plaintiff acknowledging the receipt from defendant of the sum of \$721.40, "for and on account of stones furnished to William Guilfoyle, for One hundred and fifty-second street."

The plaintiff thereupon showed, in explanation, that said note and receipt were given in the form described at the suggestion of the defendant, in order to show the destination of the goods.

The issues were submitted to the jury, who found for the plaintiff.

Defendant moved for a new trial, on the minutes generally, which motion was denied, and defendant excepted.

Judgment was thereupon entered upon the verdict, and the defendant appealed both from the judgment and order.

*Charles W. Dayton*, for appellant.

*Rufus L. Scott*, for respondent.

BY THE COURT.—FREEDMAN, J.—Upon the question whether the goods in suit were sold by plaintiff to Guilfoyle or to the defendant, the evidence was sufficient to carry the case to the jury, and consequently it would have been error to dismiss the complaint, or to direct a verdict for the defendant. The receipt and note were open to explanation (*Buswell v. Poiner*, 37 *N. Y.* 312; *Ryan v. Ward*, 48 *Id.* 204; *Trull v. Barkley*, 11 *Hun*, 644; *Churchill v. Bradley*, 43 *N. Y. Superior Ct. R.* [11 *J. & S.*] 170).

No complaint is made of the manner in which the question to whom the sale was made was left to the

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jury, and none of the exceptions presented by the record touch this point. The verdict must therefore be treated as conclusive upon this branch of the case.

The remaining questions arise upon the assignment of thirty per cent. of the moneys to be received under the contract, which the defendant as assignee of the contract executed and delivered to the plaintiff. Plaintiff claimed to have taken the said assignment as collateral security only, while the defendant insisted that it was taken in payment. This question was also left to the jury, and they were instructed to render a verdict for the defendant, in case they found that the plaintiff took it as payment. Of this disposition, the defendant has no right to complain; for even if the assignment be treated exclusively as a transfer of the obligation of a third person, which is the theory most favorable to the defendant, it could only be deemed to have been accepted in payment and satisfaction, if it had been given at the time of the sale of the goods (*Whitbeck v. Van Ness*, 11 *Johns. Ch.* 409; *Breed v. Cook*, 15 *Id.* 241).

But as there was no dispute as to the fact that the assignment was made after the sale, the presumption was that it was not taken in payment and satisfaction of the precedent debt, and the *onus* of establishing that by the agreement of the parties it was so received, was upon the defendant (*Noel v. Murray*, 13 *N. Y.* 167; *Vail v. Forster*, 4 *Id.* 312; *Gibson v. Tobey*, 46 *Id.* 637; *Turner v. Bank of Fox Lake*, 3 *Keyes*, 425; *Flower v. Lance*, 59 *N. Y.* 603 [608]).

The defendant failed to show any such agreement, and the testimony on the part of the plaintiff showed that the assignment was received as collateral security merely. Under these circumstances, the defendant was not entitled to have the jury instructed that the acceptance of the assignment was a payment *pro tanto*, unless specially agreed otherwise, and the submission



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of the whole question to the jury with the express instruction that if they found an absolute assignment, they were bound for that reason alone to render a verdict for the defendant, was certainly all, if not more, which the defendant could ask.

The judgment and order should be affirmed with costs.

SPEIR, J., concurred.

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VERINA S. M. CHAPMAN, PLAINTIFF AND APPELLANT, v. THE PHENIX NATIONAL BANK OF THE CITY OF NEW YORK, DEFENDANT AND RESPONDENT.

CONFISCATION OF PROPERTY USED FOR INSURRECTIONARY PURPOSES, UNDER ACT OF CONGRESS OF AUGUST 6, 1861, AND OF PROPERTY OF REBELS, UNDER ACT OF JULY 17, 1862.—JURISDICTION OF COURTS, GENERAL RULES.—JURISDICTION OF UNITED STATES DISTRICT COURTS UNDER THESE STATUTES.

War gives to the sovereign the right to take the persons and confiscate the property of enemies wherever found.

The right to condemn and confiscate the property of enemies captured on the high seas, exists by the law of nations. Before the courts of the United States can condemn and confiscate, as a consequence of the declaration of war, any property of an enemy found on land at the commencement of hostilities, provision by law must be made for that purpose. The right to enact such a law exists, and when enacted by the sovereign power of the United States, the judicial department must give effect to the same.

But until such enactment, no power of condemnation can exist in the courts (*Brown v. United States*, 8 *Cranch*, 110; *Miller v. United States*, 11 *Wall.* 268).

The acts of Congress above cited fully reviewed and commented upon.

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Statement of the Case.

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The provisions of these acts taken together and construed with reference to the purposes therein avowed and also expressed in their respective titles, unmistakeably show that the intention of Congress was to provide not only a complete system for the capture and condemnation of property, liable to be considered as enemy's property; but a system that should be most effective in times of great national commotion, peril, and distress; and with that end in view, it invested the district courts of the United States with full and general powers to take cognizance of, and inquire into all offenses under said acts.

Want of jurisdiction renders void the judgment of any court, whether the same is a court of superior or inferior, of general or limited jurisdiction. The recital of jurisdictional facts in the record of a judgment of any court, is not conclusive, but only *prima facie* evidence of the facts recited; and a party, against whom a judgment is offered, is not estopped or prevented by the fact of such recitals appearing, from establishing by evidence that those recitals were untrue.

If a court had no jurisdiction to pronounce the decree at the time it was made, the decree could not become valid, because of the action of the court subsequently in denying a motion to vacate the same; such denial does not constitute the position of "*res adjudicata*" so as to bar an action. Where a statute prescribes that some fact must exist before jurisdiction of the court can attach, then such fact must appear, or there can be no jurisdiction, and the court cannot acquire it by erroneously deciding that the fact exists, and that it has jurisdiction.

But where general jurisdiction is given to a court over any subject, and that jurisdiction depends upon facts brought before the court and submitted as evidence for its consideration and determination, and the court is required to act upon such evidence, then its decision, upon the question of its own jurisdiction, based upon such evidence, is conclusive until reviewed or vacated, so far, at least, as to protect its officers and all other persons who act upon the same in good faith (*Roderigas v. East River Savings Institution*, 63 N. Y. 460, and cases there cited).

The jurisdiction of the United States district courts in these cases does not depend upon the fact of the commission of the offense alone, but embraces the power to hear and determine all cases arising under these statutes; and *if in any case it shall be found that the property brought before the court belongs to a person*

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guilty of an offense under said acts, then it may be condemned as enemies' property.

In the case at bar all the proceedings and formalities required by said acts, and necessary to confer jurisdiction upon the district court, and render its decision binding, were had and complied with, and the decree of condemnation was made in the course of a judicial inquiry, in a matter over which the court had jurisdiction, and the decree cannot be impeached in any other court. The case comes directly within the principle enforced by the court of appeals in *Roderigas v. East River Savings Institution*, 63 N. Y. 460, and reaffirmed in recent case of *Lange v. Benedict*, 18 Alb. Law J. 11, and *Hunt v. Hunt*, referred to in 6 N. Y. *Weekly Dig.* 818.

Before SANFORD and FREEDMAN, JJ

*Decided November 4, 1878.*

The action was brought March 9, 1870, to recover certain dividends declared between June 1, 1861, and February 1, 1870, upon eighty-four shares of the capital stock of the Phenix Bank, and upon the same stock of the Phenix National Bank, into which the Phenix Bank became merged.

On January 8, 1859, the plaintiff (then Verina S. Moore), who resided in North Carolina, owned the said eighty-four shares, and the bank issued to her a certificate therefor, which the plaintiff retained ever since. In 1861 she was married to the Rev. Robert H. Chapman, D. D., and has ever since continued to be his wife. During the late civil war she resided in the southern States, cut off from all communication with the North.

No demand was ever made by the plaintiff for any of the dividends in suit until a short time before the commencement of the action.

The dividends declared between June 1, 1861, and March 1, 1864, remained in the possession of the de-

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fendant until March 31, 1864, when, in compliance with the decree of the district court of the United States for the southern district of New York, condemning them, and the stock on which they had been declared, as forfeited to the United States, the same were paid to the clerk of said court.

The proceedings by which the stock and dividends were condemned as forfeited to the United States, were as follows :

*First.* Robert Murray, Esq., the marshal of the United States for the southern district of New York, on February 24, 1864, by and under the authority of the President of the United States, and in obedience to the instructions of the attorney-general of the United States, and to the directions of the district attorney of the United States for the southern district of New York, and in pursuance of the act of congress entitled "An act to confiscate property used for insurrectionary purposes," approved August 6, 1861, and of the act of congress entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17, 1862, seized the said stock and dividends, to the end that the same might be confiscated, forfeited, and condemned, as required and provided in the said acts of congress.

*Second.* After the seizure a libel of information was filed and a monition was duly issued, and the marshal in obedience to the monition attached the property, and gave due notice as required by law, and made due return.

*Third.* After the return of the marshal, the decree of condemnation was made and entered. The defendant upon being served with a certified copy of the decree, on or about March 31, 1864, directing it so to do, canceled the stock certificate of said eighty-four shares on its books, and issued a new certificate for a

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like number of shares in its stead, to George F. Betts, Esq., clerk of said court, and paid to said clerk said unpaid dividends.

Afterwards said stock was duly sold by virtue of said decree, and in pursuance of a writ of a *renditioni exponas*, to other parties, who had said stock transferred on the defendant's books, and they afterwards received the dividends thereon, the same having been paid to them before the commencement of this action.

On or about March 12, 1869, the plaintiff petitioned the said U. S. district court to set aside said decree and said sale, and that the plaintiff might be allowed "to come in and defend said proceedings," on the ground that the allegations in the libel of information concerning the plaintiff's rebellious acts were untrue, which is substantially the same question which the plaintiff is seeking to litigate in this action.

The application for relief upon the petition was made on notice to the United States and to the defendant, and after hearing counsel for the respective parties the prayer of the petition was denied.

The plaintiff then brought this action.

Upon the trial by the court at special term without a jury the defendant had judgment for a dismissal of the complaint on the merits, and plaintiff appealed.

*James S. Stearns*, attorney, and of counsel, for appellant, urged:—I. By the law of nations, the only lawful judicial proceeding for the confiscation of the property of enemies was upon its capture upon the high seas. No such court was known to the law as a court for the confiscation of the property of enemies on land (*United States v. Stevenson*, 3 *Ben.* 119; *United States v. 1756 Shares of capital stock*, 5 *Blatchf.* 231). The power of congress to enact laws for such a purpose has been reviewed and affirmed in the case of *Miller v. United States* (11 *Wall.* 268). Under the

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authority so assumed by congress, it saw fit, for the purposes therein set forth, to enact the two laws in question, whereby, for and by reason of certain offenses therein set forth, the property should be condemned and forfeited to, and become the property of the United States; and by the said acts the district courts of the United States were constituted the ministers through which the purposes of the acts should be carried out, so far as to secure the condemnation and sale for the benefit of the United States, of the property which had so become vested in the United States.

II. The proceedings for the condemnation and sale of the property are entirely founded upon, and dependent upon the question of the use of the property in aid of the rebellion, or the hostile acts of the offender, as the case may be (see *Conrad v. Waples*, U. S. Sup. Court, No. 122, Oct. Term, 1877). The guilty act of the offender was held in *McVeigh v. United States* (11 *Wall.* 259), to lie at the foundation of the proceeding, and the questions of guilt and ownership were held to be fundamental in the case. The title of the United States is transferred to it by the act of the offender as decided in the case of *United States v. Stevenson* (3 *Ben.* 119), where it is held that the forfeiture takes place at the time of the commission of the offense, which operates of itself as a statutory transfer of the right of property to the government *eo instanti* (see also *United States v. Bark Reindeer*, 2 *Cliff.* 57; *United States v. 56 Barrels of Whiskey*, 1 *Abb. U. S.* 93). And the courts, when vested by these acts of congress with the power and authority to condemn and sell the property, were constituted instruments by which the property then belonging to the United States should be dealt with as therein set forth. In carrying out this power so delegated to the district courts, the first step which lay at the foundation of the whole was the vesting as aforesaid, of the property in the govern-

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ment by reason of the said hostile acts, and without such transfer of title the whole superstructure erected upon such supposed transfer must necessarily fall. It too, was even more necessary as the foundation of the proceedings, than the manual seizure of the property was necessary for the retaining of the property in the custody of the court, and the absence of such seizure, as one of the preliminary proceedings for such condemnation and sale, would be fatal (see *Miller v. United States*, 11 *Wall.* 268).

III. The belligerent rights of our government, and the extent to which these rights have been used, is decided in recent case of *Conrad v. Waples*, U. S. Supreme Court, October Term, 1877, in which Mr. Justice FIELD, in delivering the opinion of the court, held that the right to confiscate the property of enemies wherever found was conceded, but, until that right was exercised, it lay dormant. He quotes, as authority, the opinion of the court in *Browne v. United States*, 8 *Cranch*, and says, the right "remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The supreme court held that until the passage of the two acts in question there was no power of confiscation, and that after the passage of those acts, the power was limited to the specific cases mentioned, and did not include the "seizure and confiscation of property in enemies' territory, or of enemies generally."

IV. There is a distinction between a court of general jurisdiction, exercising that jurisdiction under its general powers, and the same court enforcing special proceedings, under a special limited power conferred upon it for a special purpose. The supreme court of this State would be a court of limited jurisdiction in special statutory proceedings instituted for certain specific

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purposes. In these cases, notwithstanding the general powers of the court, every step from the commencement to the final determination of the matter, is jurisdictional. The U. S. supreme court holds that if there is any irregularity about the seizure, the whole proceeding is void (*Alexandria v. Fairfax*, 95 *U. S. Sup.* 774). There the seizure was no part of the proceedings in court, but ante-dated them; on the same principle, the *status* of the property, or of the person, which also ante-dates the proceedings, and in fact, is the foundation thereof, is a jurisdictional fact, as to necessity of seizure (see also *U. S. v. Stevenson*, 3 *Ben.* 119).

V. It is claimed by the defendant that this question is one to be passed upon by the court itself, but this position is a fallacy. No court can, by any process or proof, take upon itself a jurisdiction which the law has not given it. No court, whose jurisdiction is limited to a certain class of cases, can so adjudicate upon its own powers, as to deprive other courts of the power to examine and determine for themselves the question of jurisdiction of the court so adjudicating. And here comes in the distinction in regard to the effect of a judgment of a court. Where the jurisdiction of a court is unquestioned, its judgment can only be inquired into by appeal or some application addressed to the court itself; and irregularities and errors are only to be corrected in that way; but where its jurisdiction is assailed, it is competent for any other court, whenever called upon, to inquire into that jurisdiction, whether the defect is apparent on the record itself or is proved by extrinsic evidence. The courts of this State have recognized this position, and have several times affirmed it in the following cases: *Starbuck v. Murray*, 5 *Wend.* 148; *Kerr v. Kerr*, 41 *N. Y.* 272; *Buchanan v. Rucker*, 1 *Camp.* 67; *Story on Conflicts*, § 549, note (7th Ed.); *Gray v. Larremore*, 2 *Abb. U. S.* 542; *Freeman on Judgments*, § 117; *Campbell v. Mo-*



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Cahan, 41 *Ill.* 45; *McNamara on Nullities*, 77 (*Law Lib.*, Vol. 87, p. 77); Mayor, &c. v. Porter, 18 *Md.* 285; N. Y. Fire Ins. Co. v. DeWolf, 2 *Cow.* 66.

VI. And this principle has been recognized as well in respect to proceedings *in rem* as to those *in personam*. The actual presence of the property within the limits of the court's process never being regarded as conclusive upon this subject (*Freeman on Judgments*, § 614. p. 511, also, p. 509, § 612; *Rose v. Himeley*, 4 *Cranch*, 241; see also *Buchanan v. Rucker*, 1 *Camp.* 67; *Boswell v. Dickerson*, 4 *McLean*, 262; *The Acorn*, 2 *Abb. U. S.* 445). See also *Allen v. United States*, *Taney's Decisions*, 112, where it is held that the doctrine of notice in proceedings *in rem* applies only to civil cases, and not to cases of penalty and forfeiture.

VII. In every case under these acts, which has been reported, there has been evidence to sustain the decree; and the remarkable case is here presented of a decree of condemnation against a loyal citizen, upon an unverified libel, and no evidence whatever, without her knowledge, and while she was out of reach of even a published notice, which, under similar circumstances was called a mere idle form in *Lasere v. Rochereau*, 17 *Wall.* 439 (quoting from *Dean v. Nelson*, 10 *Wall.* 172). It is unreasonable to suppose that congress meant to give the district courts power thus to deprive persons of their property, upon a mere irresponsible statement; when the owners of that property were cut off from all communication, and unable either to appear to assert a claim, or even to obtain information of the proceedings. It cannot be believed that congress intended to make these laws an engine of oppression and robbery to innocent parties.

VIII. The case of *Roderigas v. East River Savings Institution*, is, of course, fresh in the minds of the court. There the superior court first decided that the

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surrogate's determination of the death of a party was not conclusive, even upon legal proof presented to him according to law, and that the payment to the administrator of the person erroneously sworn to be deceased was no payment at all. The court of appeals, however, reversed this decision (63 *N. Y.* 460). EARL, J., in delivering the opinion, says (p. 463) that the jurisdiction of surrogates' courts "to grant administration upon the estates of deceased persons is general and exclusive. No court, no matter how general its jurisdiction may be, which proceeds without jurisdiction in the particular case, can make a valid record, or confer any rights. When a statute prescribes that some fact must exist before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact exists and that it has jurisdiction." But, he holds, that where general jurisdiction is given, and the jurisdictional fact is to be determined by the court, upon evidence, its decision upon the question of jurisdiction is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent parties who act upon the faith of it. This is the gist of the whole case. The court must determine the "jurisdictional fact upon evidence presented to it. In the present case, as shown above, there was no evidence whatever for the court to pass upon—not even an affidavit. Judge MILLER says, on page 472, if the statute "had provided only for the issuing of letters, and not proceeded to state what proof was required, it might well be argued that no jurisdiction was acquired. So, if the surrogate had issued the letters without the requisite proof, the same result would follow." The judgment of the superior court was reversed by a vote of four against three, showing that even when the determination of the sur-

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rogate was founded upon legal evidence, the court was almost evenly divided as to its effect. The principle is recognized in that case that there must be evidence, in order to give the determination any effect, and, if there had been no such evidence, the court of appeals would, of course, have held the letters of administration to be a nullity. Applying this decision to the present case, the proceedings were of no force or effect, and no title to the stock would pass thereby.

IX. The plaintiff could not be barred without her day in court—without an opportunity to be heard. No notice published in the proceedings could affect her, because she was out of reach of any such notices. A notice directed to her, and published in a newspaper was a “mere idle form,” she “could not lawfully see nor obey it.” As to her, the proceedings were wholly void and inoperative (see *Dean v. Nelson*, 10 *Wall.* 172; *Lasere v. Rochereau*, 17 *Id.* 437). This is not the case of a capture within the enemy's country, but is that of a proceeding in the courts of the northern States for the condemnation of property forfeited for certain offenses mentioned in the laws, and the jurisdiction of the courts is confined to those cases.

X. It cannot be contended that in order to create a forfeiture, congress must call it by that name. The acts provided that for certain offenses the property should be seized, and in the one case the entire proceeds go to the United States, and in the other one-half to the United States and one-half to the informer. What is this but a forfeiture? Forfeitures—“The losing of some right, privilege, estate, honor, office or effects, by an offense, crime, breach of condition or other act.” —*Webster's Dic.* Burrill defines “forfeit” as follows: “To lose as the penalty of some misdeed or negligence. The word includes not merely the idea of losing, but also of having the property transferred

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to another without the consent of the owner and wrong-doer." The fact that congress so carefully defined the causes or grounds of condemnation, limiting them to special classes of persons and special predicaments of property, shows that it was the intention of congress to make these jurisdictional facts. Why? Because otherwise every person within the rebel lines would be at the mercy of the harpies and jackals who infested the north at this period. If this property was subject to forfeiture, then the property of every loyalist, north or south, was also subject. All that was needed was an information like the present, and a complaisant bailee like the defendant, and any loyalist, male or female, idiot or infant, in the enemy's country, or out of it, could be stripped of his estate. No proof was needed, an unverified libel did the work. Congress did not intend to sanction this class of land piracy.

XI. What do the acts of congress give the president power to do? To seize and condemn, in the courts of the loyal state, any property belonging to any person in any of the loyal or disloyal states, upon an allegation that the property was within any of the specified classes? No, but on the contrary it is on the one hand the estate, &c., of the person named in the acts; that of persons who were, in fact, in one or the other of the categories, or on the other hand, the property actually used in aid of the rebellion. If the proceeding was against a mere citizen it was not enough to show him in sympathy with the rebellion, or an alien enemy, but it must appear that after the passage of the act he has committed one of the offenses specified, and the caution of congress is shown in the provision which declares that to bring certain persons within the penalties of the statute, it must appear that they took office subsequent to the adoption of the ordinance of secession, or took the southern oath of al-

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legiance. What is the legal proceeding for? It is to make effectual, to reduce to manual possession, and put in a condition to be available for the purposes of the government "the property above described," *i. e.*, the property actually within the condemnation of the law, and therefore forfeited to the government. Here the effort of the defense is to sustain a technical condemnation by default, under highly penal statutes, where there was no proof at the time it was had, that the property was liable to condemnation, by technical rules, in opposition to the conceded facts that there was not only nothing in the case to justify that condemnation, but that the defendants well knew that this was so. The construction urged by the defendant leaves the innocent owner wholly without remedy. The proceedings were entirely null and void, the property was proceeded against as that of "Ver. S. Moore," and no proceedings were taken against the plaintiff as the owner of the stock. The court had no power or jurisdiction to condemn property in this way (see *Conrad v. Waples*, U. S. Sup. Ct., Oct. T. 1877).

XII. But even if the court had jurisdiction and had attempted to assert it, the notices given before the filing of the libel are not such a seizure as could be construed into a manucaption of the property by the marshal. In other words, the title to stock cannot be changed in the manner claimed by defendants in this case (*Pelham v. Rose*, 9 *Wall.* 107). Upon this subject the dissenting opinion of Justices FIELD and CLIFFORD in the above case of *Miller v. U. S.* (11 *Wall.* 325, &c.), furnish a very strong argument, and one which is worthy of consideration (*Holbrook v. New Jersey Zinc Co.*, 57 *N. Y.* 616). The contract which the company makes is always binding. It is bound to recognize those to whom the certificates have been issued, or their legal transferees. Plaintiff is, and has been throughout,

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a corporator, a member of the defendant corporation, and entitled to all the rights and privileges of such. She is, and has been, a part owner of the franchises of the corporation, and can not be deprived of these rights in the manner attempted. This interest in the franchise cannot be transferred by a mere decree of a prize court, directing or declaring the transfer. A court, obtaining jurisdiction of the person, may compel an assignment, and delivery of the certificate, but until the certificate is actually surrendered into the possession of the corporation, no title passes. This is the necessary result of the decisions which are authority. Stock is not a chattel which can be handled, or real estate, which can be attached. It is intangible. It follows the person of the owner, to whom the certificate is issued. It is, in fact, a mere right, which entitles its possessor to certain privileges, and it can no more be made the subject of process than the debt in the *Pelham v. Rose* case. The issue of the certificate of stock to Blossom was ineffectual to deprive the plaintiff of her stock, or affect her in any way. The bank could not create any new stock, or deprive plaintiff of hers. The plaintiff's shares "belonged to 'her' in 'her' individual right, and were as much 'her' separate and individual property as any other possession which 'she' could acquire. The entire capital was represented in the property and franchises of the corporation, and the owner of each share was entitled to a fixed and unalterable proportion of that capital." There is no power to increase either the nominal or real capital beyond the amount fixed, and the issue of a certificate for shares in excess of the number is of no force or effect whatever (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 *N. Y.* 617). It being the recognized law in this State that stock cannot be transferred in the manner claimed by defendant, if there is any conflict between the State and federal courts on the subject, those of the State must control (*Poole v. Kermit*, 37 *N.*

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*Y. Superior Ct.* 115; *Town of Venice v. Breed*, 1 *N. Y. Supreme Ct.* 131).

*Edgar S. Van Winkle*, attorney, and of counsel for respondent, urged :—I. The confiscation and condemnation of the stock mentioned in the complaint, and of the accrued dividends thereon by the United States district court in the proceedings and by the decree mentioned in the answer, is a defense to this action. 1. The United States district court had jurisdiction of the subject matter by the terms of the two acts of congress before referred to (12 *Stat. at L.* 319 and 589). (*a*) Jurisdiction was not lost by reason of the absence of the party charged with the offense. The decree of condemnation and confiscation was given in accordance with the provisions of United States statutes, which, as intended for times of peculiar national peril and emergency, were extraordinary in their character, and evidently contemplated the probable necessity of an absolute decree of forfeiture against parties who, owing to their residence in distant and rebellious States, might have no opportunity to defend. The proceedings were an action *in rem*, in which all parties interested had a right to appear, and which for that reason and from certain considerations of public policy must be held conclusive against all the world (1 *Greenleaf on Evidence*, §§ 525 and 543, Redf. Ed.). “Where on an information under the said act, the information alleging that the property belongs to A., and that it is liable to forfeiture under the act (all the allegations being in form), the court has proceeded as the act directs it to do, after default, and, hearing and determining the case only after such hearing and consideration condemns the property, it must be presumed that the property belonged to a person engaged in the rebellion, or one who had given aid or comfort thereto” (*Confiscation Cases*, *Slidell's Law*, 20 *Wall.*).



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(b) It cannot be argued that, because of the innocence of the party charged with the treasonable offense, the United States district court had no jurisdiction. Defendant claims that all evidence admitted at the special term tending to prove the innocence of the plaintiff, was irrelevant and improper, but assuming that such innocence has been established, and that the district court erred in deciding that said plaintiff incurred the penalty of forfeiture of her stocks and dividends, by bringing herself within the terms of the statutes, that mistake cannot be reviewed by this court, but can only be cured on appeal. Otherwise there would virtually be no end to litigation, for any party condemned might have recourse to another tribunal of concurrent jurisdiction, and again offer proof of his innocence on the ground that if he was innocent the first court had no jurisdiction (see authorities cited below, and also *United States v. Arredondo*, 6 *Pet.* 709). This last cited case seems conclusive on this point: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction" (*United States v. Arredondo*, 6 *Pet.* 709). (c) It appears that all the proceedings and formalities required by the two acts of congress and necessary to give the United States court jurisdiction and render its decision binding, were followed out in this case as prescribed. And even if it did not so appear, the authority of the United States district court would be presumed until the contrary were shown (*Ruckman v. Cowell*, 1 *N. Y.* 505, 507; *McCormick v. Sullivant*, 10 *Wheat.* 192; *Miller v. United States*, 11 *Wall.* 299, 300). The supreme court of the United States has laid down the rule that when a statute prescribes the manner in which the rights conferred



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by it are to be pursued, and the powers delegated by it are to be exercised in a special and summary manner, the proceedings of the court will be considered as of the same character as the proceedings of courts not of record, but when the statute confers new powers and rights, to be brought into action by the usual form of common law or of chancery practice, the proceedings and judgment of the court will have all the characteristics of the proceedings and judgments of courts of record (Harvey v. Tyler, 2 Wall. 342). Moreover, an irregularity, if there were one, could not be reviewed by this court in a collateral proceeding (Kelsey v. Beers, 16 Abb. Pr. 228; Voorhies v. Bank of U. S., 10 Pet. 440). The fact that the libel of information was not verified did not render it irregular. (Rules 3 and 5 of U. S. District Court, 1865). Rule 3. Libels (except on behalf of the United States), praying an attachment *in personam* or *in rem*, or demanding the answer of any party, must be verified by oath or affirmation. 2. The decree of condemnation by the U. S. district court was a judgment *in rem*, which judgment of itself divested the plaintiff of her title to the stock and the dividends thereon, and vested the title in the United States. "In all forfeitures accruing at common law, nothing vests in the government until some legal steps shall be taken for the assertion of the right. . . . When a forfeiture is given by a statute . . . the thing forfeited may either vest immediately (on commission of the offense), or on the performance of some particular act (as obtaining judgment). This must depend upon the construction of the statute" (Opinion of MARSHALL, Ch. J., United States v. Grundy, 3 Cranch, 337). Unless the phraseology of the statute expressly declares that the forfeiture shall take place upon the commission of the offense, "it is proper to resort to analogy and the doctrine of forfeiture at common law to assist the mind in coming to a conclusion"

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(United States v. Bags of Coffee, 8 *Cranch*, 405). Of the statutes affecting the present case, the act of 1861 declares that all such property (property declared subject to capture) shall be lawful subject of prize and capture wherever found. And it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned. And further, that the attorney-general or any district-attorney of the United States may institute the proceedings of condemnation. And the act of 1862, section 5, authorizes and makes it the duty of the President of the United States to cause the seizure of the property in question, and section 7 further enacts that, to secure the condemnation and sale of any of such property after the same shall have been seized, proceedings *in rem* shall be instituted in the name of the United States in any district court. The only reasonable construction of these statutes requires that the change of title date from the decree of the court, and not from the commission of the offense ; but this point is immaterial to the present discussion, for in either event the alleged case certainly came within the jurisdiction of the court (*Gelston v. Hoyt*, 3 *Wheat*. 246 ; *Williams v. Armroyd*, 7 *Cranch*, 424). 3. Decrees of a court of competent jurisdiction on the point in issue before it can only be reviewed by appeal, except in cases of fraud, and while unreversed are conclusive upon all other courts (*Bigelow v. Winsor*, 1 *Gray*, 299 ; *Burhaus v. Van Zandt*, 7 *N. Y.* 523 ; *Cooke v. Halsey*, 16 *Pet.* 71 ; *Stilwell v. Carpenter*, 59 *N. Y.* 414 ; *Smith v. Nelson*, 62 *Id.* 286 ; Cases cited in 1 *Abb. Nat. Dig.* p. 122, § 139 ; and cases cited below under (b) and (c) ; *In re Tobias Watkins*, 2 *Pet.* 207). (a) Judgment by default a bar where no proof was offered (*Ogsbury v. La Farge*, 2 *N. Y.* 113 ; *Binck v. Wood*, 43 *Barb.* 315). (b) The judgment of a court of the United States, the subject matter of which is within its jurisdiction, can-

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not be impeached by a State court (*Kelsey v. Beers*, 16 *Abb. Pr.* 228; *Kenape's Lessee v. Kennedy*, 5 *Cranch*, 185. See opinion of MARSHALL, Ch. J., in *Ex parte Tobias Watkins*, 3 *Pet.* 193; *Chemung Canal Bank v. Judson*, 8 *N. Y.* 254; *Elliott v. Peirsol*, 1 *Pet.* 328, 340; *Ruckman v. Powell*, 1 *N. Y.* 507, and cases there cited; *Watson on Sheriffs*, 53, 54, 55, 7 vol., Law Library; *Harrison's Digest*, 3 vol., p. 6373, 4, 5; 2 *Cranch*, 168; 6 *Id.* 267; 10 *Pet.* 449; 3 *Ohio*, 306; 2 *Metc.* 408; 3 *Id.* 460; 6 *How. U. S.* 31). (c) This is true as well in the case of a judgment *in rem* (*Gelston v. Hoyt*, 3 *Wheat.* 246; *Williams v. Armroyd*, 7 *Cranch*, 423; *Hudson v. Guestier*, 6 *Id.* 281; 1 *Greenleaf on Evidence*, § 525, and § 543, Red. Ed.). 4. The judgment of the United States district court was properly pleaded in this action (See *Code of Procedure*, § 161; 4 *Abb. Digest*, title Pleading under Code, 1586; *Bement v. Winser*, 1 *Code Rep. N. S.* 143).

II. It follows, therefore, that the exception in the case, that the U. S. district court record showed no jurisdiction and was void, insufficient and irrelevant, was not well taken. It has been shown above that the court had jurisdiction of the subject matter and over the property, and that the record was not void, but valid, because the case presented by the libel of information was one which the U. S. district court had the right to consider and determine. And the court's determination in that case, whether right or wrong, cannot be questioned in this action or collaterally. The record, therefore, showed jurisdiction, was valid and sufficient. It was therefore relevant, and was, in fact, a bar to this action.

III. The objection that it was immaterial what the bank had done with the stock, was not well taken. That fact was material, because the dividends followed the stock, and it was material to show that after the stock and dividends thereon were confiscated and condemned,

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the stock was transferred and the dividends which thereafter were declared on that stock were paid over to the owners of the stock. The exception to introducing in evidence the certified copy of the decree which was served on the bank when the stock was transferred to the clerk of the U. S. district court, and the dividends paid over to him as directed by the decree, and the new certificate thereafter issued to represent the eighty-four shares of stock was not well taken. These were material to show that the bank paid over the dividends to the proper parties.

IV. *First*.—It may seem to be a hardship that the plaintiff should have forfeited her stock when she was not guilty of the offense charged to work the forfeiture, and was not present at the trial to defend, but it must be remembered that the proceedings were taken under the authority of certain laws which were made necessary by civil war, and which have been declared constitutional in the case of *Miller v. U. S.* (11 *Wall.* 268), and certainly this court has no discretion to set aside these proceedings by reason of commiseration for the party affected. This is but a particular case of hardship, and the party, although without fault, must submit to the inevitable misfortune. *Second*.—On the other hand, to sustain this claim of the plaintiff against the bank, would be to establish a general principle which might affect with a like misfortune hundreds of innocent parties. The bank, in this case, has acted under the protection of the law, under the duress of the law, and it would be introducing a new principle and a pernicious example to render it liable to the plaintiff in opposition to the established law, and would bring discredit and distrust upon all the decrees of the courts of the United States.

BY THE COURT.—FREEDMAN, J.—This action is sought to be sustained on the theory that the plaintiff

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had no notice or knowledge of the proceedings instituted in the United States district court, which resulted in the decree of condemnation ; that said proceedings were founded upon alleged offenses on the part of one Ver. S. Moore of which the plaintiff was wholly innocent ; and that consequently the decree of the United States district court was made without jurisdiction and is void.

If that court had no jurisdiction to pronounce the decree at the time it was made, the decree could not become valid by the denial of the motion to open it, and such denial does not constitute *res adjudicata* so as to bar this action.

As to the question of jurisdiction, it is true that want of jurisdiction renders void the judgment of any court, whether it be of superior or inferior, of general, limited, or local jurisdiction, or of record or not ; and the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the facts recited ; and a party against whom a judgment is offered, is not, by the bare fact of such recitals, estopped from showing by affirmative facts that they were untrue.

But the difficulty is to find and determine the conditions upon which the jurisdiction of the district courts of the United States in this class of cases depends.

When a statute prescribes that some fact must exist before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact exists, and that it has jurisdiction.

But where general jurisdiction is given to a court over any subject, and that jurisdiction depends, in a particular case, upon facts which must be brought before the court for its determination upon evidence, and

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where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked, or vacated, so far as to protect its officers and all other innocent persons who act upon the faith of it.

Roderigas v. East River Savings Institution, per EARL, J., 63 N. Y. 460 (464), and cases there cited.

War gives to the sovereign the right to take the persons and confiscate the property of enemies wherever found. This rigid rule still exists, though the exercise of the right may have been more or less affected by the humane policy of modern times. The right to condemn and confiscate the property of enemies captured on the high seas, exists by the law of nations. But before the courts of the United States can condemn and confiscate, as a consequence of the declaration of war, any property of the enemy found on land at the commencement of hostilities, provision must first be made by law for that purpose. The right to enact such a law exists, and when the sovereign authority of the United States shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in any of the courts (*Brown v. United States*, 8 *Cranch*, 110).

The power of congress to enact laws for such a purpose has been reviewed and affirmed in the case of *Miller v. United States*, 11 *Wall.* 268.

In the exercise of this power congress enacted the act of August 6, 1861, entitled "An act to confiscate property used for insurrectionary purposes;" and the act of July 17, 1862, entitled, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

The act of 1861 applies only to property acquired with intent to use or employ the same, or to suffer the

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same to be used or employed, in aiding or abetting insurrection, or in resisting the laws; and the act of 1862, so far as it relates to the confiscation of property, applies only to the property of persons who *thereafter* might be guilty of acts of disloyalty or treason (Conrad v. Waples, U. S. Supreme Court, No. 122, October Term, 1877).

By these acts it was further provided that for the offenses therein set forth the property of the persons so offending should be condemned and forfeited to, and become the property of the United States, and that the district courts of the United States should have jurisdiction to carry out the purposes of said acts so as to secure the condemnation and sale, for the benefit of the United States, of the property thus liable to seizure, condemnation and sale.

For the purposes of the present appeal, it is immaterial whether the title of the offender is transferred to the United States by his guilty act, as has been held in United States v. Stevenson (3 Ben. 119), or pursuant to judicial sentence of condemnation, for in every case the property claimed must be seized and brought into court before it can be finally condemned and applied as directed by said acts.

The question then remains whether the jurisdiction of the courts of the United States to entertain proceedings for condemnation, depends exclusively upon the fact of the commission of the offense, or whether it includes the general power to inquire and determine whether an offense has been committed, and to pronounce judgment according to the fact as it may be made to appear.

This question must be determined upon the construction of said acts and in accordance with the general legislative intent apparent from their enactment.

In addition to the provisions already referred to, the act of 1861 provides that all property liable to cap-



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ture under it, shall be lawful subject of prize and capture wherever found, that it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned; that the attorney-general or any district-attorney of the United States may institute the proceedings for condemnation, in which case they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts; and that such prizes and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted.

The act of 1862 makes it the duty of the President of the United States to cause all property liable to seizure and condemnation under said act, to be seized and the proceeds thereof to be applied for the support of the army of the United States (§ 5). It also provides that to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district court thereof, within whose territorial jurisdiction the property, or any part thereof, may have been found, or into which the same, if movable, may have been first brought; that such proceedings shall conform, as nearly as may be, to proceedings in admiralty or revenue cases; and that, if said property, whether real or personal, *shall be found* to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property and become the property of the United States, and thereupon it may be disposed of as the court may decree (§ 7). It fur-



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ther provides that the said district courts shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof, where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of the act, &c., &c. (§ 8). And finally the said act confers upon the said court full power to institute proceedings, make orders and decrees, issue process, and do all other things necessary to carry the act into effect (§ 14).

These provisions, taken together, and construed with reference to the purposes therein avowed and also expressed in the titles of the respective acts, it seems to me, unmistakably show that the intention of congress was to provide not only a complete system for the capture and condemnation of property liable to be considered as enemies' property, but also one which should be effective in times of great national peril and commotion, and for that purpose to invest the district courts of the United States with the general power to take cognizance of and inquire into all offenses under said acts. Their jurisdiction is not made to depend upon the fact of the commission of the offense, but embraces the power to hear and determine all cases arising under the statute; and if in any case it shall be *found* that the property brought before the court belongs to a person guilty of an offense under the said acts, then it may be condemned as enemies' property.

In the case at bar, all the proceedings and formalities required by the two acts of congress, and necessary to give the district court jurisdiction and render its decision binding, were had and complied with. The proceeding was *in rem*; the property was brought before the court, after seizure by the marshal, a libel of information was filed, and a monition duly issued;

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all persons interested in the said property were cited, in general and special, as the law directs, to answer the matters alleged against it ; and upon the marshal's return of the monition, and proof of such notice, no one intervening, the decree of condemnation was made and entered. The court throughout acted according to its rules and course of practice adopted and promulgated for the disposition of such cases, and hence the decree of condemnation was made in the course of a judicial inquiry in a matter over which the court had jurisdiction. This being so, the decree of condemnation cannot be impeached in any other court. The case comes directly within the principle enforced by the court of appeals in *Roderigas v. East River Savings Institution* (63 *N. Y.* 460), and reaffirmed in the recent cases of *Lange v. Benedict*, reported 18 *Alb. Law J.* 11, and *Hunt v. Hunt*, referred to in 6 *N. Y. Weekly Dig.* 313.

These authorities being quite conclusive, it is not necessary to refer to the decisions of the supreme court of the United States, to the effect, that a decree of a court of competent jurisdiction on the point in issue before it, can only be reviewed by appeal, except in cases of fraud, and that, while unreversed, it is conclusive upon all other courts, and also that the judgment of a court of the United States, the subject matter of which is within its jurisdiction, cannot be impeached by a State court.

It therefore can make no difference that the libel of information filed in this case was not verified. It was filed by the district attorney of the United States for the southern district of New York in the discharge of his official duty, and under the responsibility of his official oath, and by the rules of the district court for said district, libels filed on behalf of the United States are excepted from the general requirement that libels praying an attachment *in personam* or *in rem*, or

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demanding the answer of any party, must be verified by oath or affirmation. This point presents only a question of pleading, or, at most, one of regularity. It does not touch the question of jurisdiction.

Nor can it make any difference that the plaintiff was not actually served with process, and remained ignorant of the proceedings. Service was made in the method prescribed by law in such cases as a substitute for personal service, and this was equivalent to personal service. Similar service is even sufficient in certain personal actions. Thus, in *Hunt v. Hunt* (*supra*), it was held that in an action for divorce a valid judgment *in personam*, so as to effect a dissolution of the marriage contract which shall be prevalent everywhere, may be rendered against a defendant not within the territorial jurisdiction during the progress of the suit, if that be the place of his citizenship and domicile, though process be served upon him only in some method prescribed by the laws of that jurisdiction as a substitute for personal service, and though he has not voluntarily appeared. In cases like the one at bar, the statutes of the United States evidently contemplated the probable necessity of an absolute decree of condemnation against parties who, owing to their residence in distant and rebellious States, might have no opportunity to defend, and suitable provision was made for the contingency. The proceedings are by action *in rem*, in which all parties interested have a right to appear pursuant to the monition issuing from the court. But no personal service or actual notice is necessary; and finally it cannot avail the plaintiff that she is innocent of the alleged offense for which her property was condemned and sold. Assuming that her innocence has been fully established, and that the district court erred in condemning her stock and dividends, such error cannot be rectified by this court. Her remedy is by application to the court that made

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the decree or by appeal. Her case, as made out, discloses great hardship, especially as she did apply for relief to the district court and the prayer of her petition was denied. But we have no discretion to set aside the decree of the former court by reason of commiseration for her. On the other hand, to sustain plaintiff's claim, even if it could be done, would entail equal hardship upon the defendant. The bank in this case has acted solely under the compulsion of the law as pronounced by the district court, and for any other court to compel it, though without fault, to pay a second time, would be introducing a novel principle and a dangerous precedent.

For the same reasons the plaintiff cannot escape from the decree of the district court by insisting that the seizure by the marshal of her stock and the dividends accrued thereon, was not, while she had the actual possession of the certificates, such a manucaption of the property as was necessary to confer jurisdiction upon the court, and that consequently her title could not be changed by judicial sentence in the manner attempted. The act of 1862 applies in express terms to "all the estate and property, money, stocks, credits and effects" of the offender (§ 5). Therefore, the questions relating to the sufficiency of the seizure and the liability of the property seized to condemnation, were questions to be determined by the district court according to its course and practice. If they were of a jurisdictional character, the court, in pronouncing judgment, of necessity decided in favor of its jurisdiction, and so, under the statutes referred to and already shown, it had the general power and jurisdiction to inquire into all offenses under said acts, its judgment, standing unreversed, must, under the decisions in *Roderigas v. East River Savings Institution*, and *Hunt v. Hunt* (*supra*), be held conclusive upon these as well as all other questions properly embraced therein. At any rate, the seizure,

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as made, was followed up by the condemnation and sale of the property, the transfer of the stock on the books of the company, and the payment into court of the dividends now claimed, and for these reasons the plaintiff stands confronted not merely with a judicial sentence on paper, but also with the results of the sentence as executed. *Pelham v. Rose*, 9 *Wall.* 103, is not in point. It was an action against a marshal for a false return. He had been commanded to attach a certain note and to detain the same in his custody. For the purpose of determining his liability upon a certain return made by him, it was held that the due and legal service of the writ required him to take the note into his actual custody and control.

*Holbrook v. New Jersey Zinc Co.*, 57 *N. Y.* 616, was decided upon the theory that in an action against a corporation by a bona fide purchaser for value of certain certificates of its stock, the corporation was estopped from repudiating the terms of transfer to which it had consented upon the face of the certificates.

This decision was placed upon grounds of public policy. It turned mainly upon the facts of the case, and was in nowise controlled by the provisions of any statute. The present case, on the other hand, turns entirely upon statutory provisions which are clear and explicit in themselves, and call for their own enforcement in preference to any other principle of law, which but for the existence of the statute, might apply.

The judgment appealed from should be affirmed with costs.

SANFORD, J., concurred.

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CORNELIUS MEINERS, PLAINTIFF AND RESPOND-  
ENT, v. WILLIAM STEINWAY AND CHRIS-  
TIAN F. T. STEINWAY, DEFENDANTS AND  
APPELLANTS.

I. EVIDENCE.—WITNESS.

1. EXPERTS.

(a) CAPACITY OF A MACHINE TO DO CERTAIN REQUIRED WORK.

1. Where in an action to recover the price of a machine sold upon the contingency that it was to be tested for a certain length of time, and in that time was to perform certain work, the issue was on the performance of the contingency, and the testimony was conflicting on the question as to how and for what length of time the test was to be made, and whether it had in fact been completed according to the real terms of the sale, and in a certain view the further question presented itself whether the completion of the test agreed on had or not been prevented or secured by the conduct of the defendants:

HELD,

that the testimony of experts, to the effect that from inherent imperfections plainly to be seen, the machine was incapable of performing the required work, had a material bearing on all the disputed points, and its exclusion was error.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

Appeal from a judgment entered upon the verdict of a jury, and also from an order denying defendant's motion on the judge's minutes for a new trial.

The motion for a new trial was made on the exceptions taken during the trial, and also on the ground that the verdict was excessive and contrary to the evidence and the law.

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*G. W. Cotterill*, attorney, and of counsel, for appellants.

*Wm. W. Badger*, attorney, and of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—This action was brought upon an absolute and unqualified sale of a band saw-mill at the agreed price of \$3,000.

During the trial the plaintiff obtained leave to amend the complaint by alleging an absolute and unqualified sale to the extent of \$2,500, and a subsequent modification of it under which the plaintiff was to receive an additional \$100 for each thousand feet that the mill sheet cut above 5,000 and up to 10,000 feet per day.

The trial thereupon proceeded with the understanding that as against the complaint thus amended the defendants would continue to rely upon their general denial; but that, if it should become necessary, they would show that whatever contract of sale there ever was was a conditional one, and depending upon the performance of a certain test, and that the machine never performed the test, nor could it do so.

Subsequently, however, testimony offered by the defendants for the purpose of demonstrating that the machine was incapable of performing the test, was excluded, to which rulings the defendants excepted. The objection which led to this exclusion, was that evidence of experts as to the mechanical construction of the mill was irrelevant, for the reason that there was nothing in the nature of a warranty set up in the answer.

At the close of the evidence on both sides, it was apparent that the plaintiff had failed to establish the allegations of both the original and the amended complaint, and thereupon, against defendants' objection

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and exception, he obtained leave to again change his complaint so as to aver a sale at a price not less than \$2,500, contingent upon the mill sawing 5,000 feet per day, and with the additional contingency that the price should be increased \$100, for every thousand feet that the mill sawed per day over 5,000, and to 10,000 feet, and that the plaintiff so performed this contract as to become entitled under it to the sum of \$3,000.

The questions remaining under the issues as thus changed, were thereupon, upon the evidence as it then stood, submitted to the jury.

The principal difference then remaining between the parties related to the actual capacity of the mill to do any of the required work for the time during which the test was to be continued. There was quite a conflict of testimony upon the questions, as to how, and for what length of time the test was to be made, and whether the test had in fact been completed according to the real terms of the sale. In a certain view which the jury were authorized to take, if they saw fit, the further question presented itself, whether the completion of the test agreed upon had or not been prevented or excused by the conduct of the defendants.

Upon every one of these disputed points the excluded evidence, it seems to me, would have had a more or less important, but material, bearing; for if the contract, as a whole, was made to depend from the beginning upon the performance of a specified test for a specified length of time, and the conflict created by the testimony of the parties left it in doubt whether the test had been substantially performed, the testimony of experts to the effect, that from inherent imperfections plainly to be seen, the mill was incapable of performing it, might have turned the scale. For this purpose the excluded evidence was admissible under the plead-



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ings as, ordered to stand amended, and its exclusion was calculated to prejudice defendant's case before the jury.

Upon the whole case I am very clear in the opinion that the ends of justice require a new trial, especially as since the trial, the plaintiff has expressly refused to complete the record by the insertion of the amendment of the complaint granted for his benefit at the close of the testimony.

The judgment and order should be severally reversed, and a new trial ordered, with costs to appellants to abide the event.

SPEIR, J., concurred.

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WILLIAM P. BENSEL, *et al.*, EXRS. & CO., PLAINTIFFS  
AND APPELLANTS, v. HORATIO N. GRAY, DE-  
FENDANT AND RESPONDENT.

I. MUNICIPAL CORPORATION LEASES.

1. *Agreement to assign.*

(a) CONSTITUTES AGREEMENT TO GRANT AND ASSIGN AN ESTATE IN  
THE DEMISED LAND FOR THE REMAINDER OF THE TERM, WHEN.

1. When it contains a clause "with all and singular the  
premises therein mentioned and described, and the build-

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NOTE. This is the decision on the appeal from a judgment entered on a second trial of this action.

On the first trial plaintiffs recovered judgment, the court resting its decision on the proposition (as controlling the decision of the case) that there was no warranty to be implied in an agreement to assign a tax lease by a municipal corporation, and consequently refusing to pass on the evidence adduced as to the invalidity of the lease.

On appeal by defendant, the general term held that a warranty was implied, and that the refusal of the court below was error, it also

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ings thereon, with the appurtenances, to have and to hold the same for and during all the rest, residue, and remainder yet to come of and in the term of years men-

held that the fact that the defendant went into possession, under the contract, did not deprive him of the right to acquire it in fee, and to contest the tax title. The judgment below was reversed, and a new trial ordered (38 *N. Y. Superior Court*, 447).

Plaintiffs *stipulated* and appealed to the court of appeals. That court (62 *N. Y.* 632) held, in conformity with its previous decision in *Boyd v. Schlesinger*, 59 *N. Y.* 301 (then still in *MSS.*), that in an agreement to assign a corporation tax lease there was not an implied warranty of title to a leasehold interest, and that consequently the general term decision could not be sustained on the basis on which it was placed. It, however, held that in either of two aspects (which were not presented to or passed on by either the special or general term, and need not have been, under the views which controlled the decision there) it was necessary to pass on the evidence given as to the validity of the leases. (1) If the agreement undertook to assign, not only the leases as merely instruments in writing, but also to transfer the right in the premises for the term in the leases named, it was necessary that the force of that testimony should be passed on. (2) It was equally necessary, even if the agreement did not so undertake, but only to assign the writing, and thereby agreed to transfer nothing valuable, and so left the contract of the defendant without consideration to support it. It, however, declined to construe the contract, because, if it was construed favorably to the defendant, it might involve the necessity of determining the question of fact as to the validity of the leases, and if the determination was against the validity it would lead to a reversal of a judgment of the special term on a question of fact as to which that court had made no finding, which would be contrary to the established rule.

The court also declined to reverse the judgment of the general term and affirm that of the special term, on the ground that the former was wrong and the latter right on the question of implied warranty, and that the positions taken by the defendant in that court were not in the way of its so doing, inasmuch as they were not pleaded by his answer, nor taken in the court below, because there were exceptions taken on the trial by the defendant, which were not considered by the general term, and which might have been presented in his favor if that court had thought it necessary to have noticed them, and which the defendant had a right to urge on the plaintiff's appeal. (*Simon v. Canaday*, 53 *N. Y.* 298).

But for various reasons, among them the fact that the objections to

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tioned in said indenture of leases," with a covenant that the assigned premises are free from incumbrances.

1. INCIDENTS TO SUCH AN AGREEMENT.

Implied covenants.

(a) *Title*.—A covenant that the vendors have a good title to the premises described in the lease, for the residue of the demised term, is to be implied.

(b) *Lessor's right*.—A covenant that the corporation had the right and power to grant the estate and term in manner and form as in the lease expressed, is also to be implied.

2. REGULARITY AND VALIDITY OF LEASE; BURTHEN OF PROOF.

The burthen of proof is on the vendors, to show the regularity and validity of the lease.

II. TAX SALES—INVALID.

The sales for the taxes of the years 1841, 1842, 1843, and the leases given thereon, and the sale for the years 1853 and 1854, and the leases given thereon, are invalid and void.

III. TITLE TO LANDS.

1. *Possession, necessity of to sustain.*

(a) ONE OF THE CASES IN WHICH IT IS NOT REQUISITE.

1. Where one traces a clear paper title from a conceded owner, and is in possession, it is unnecessary for him, as against one whose only claim is under a lease made by a municipal corporation on a sale for taxes, to show a possession prior to his by the conceded owner, or any subsequent grantee deriving title from such conceded owner.

(a) *This although* he who claims under the tax lease had been in actual possession over twenty years, and the one claiming the fee had but recently entered upon the premises and obtained possession by putting the holder of the tax lease off his guard.

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evidence taken by the defendant did not enter into a consideration of the case by the general term, the court concluded to exercise a power which it had frequently in analogous cases felt called on to exercise, and permit the appellants to take a *dismissal of their appeal and proceed to a new trial*.

The court referred to previous decisions made by it as to the effect of municipal tax leases as clouds on titles, as to bills *quia timet*, and as to its not being possible that possession under a tax lease could become adverse to the right of the real owner.

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## IV. VENDOR AND VENDEE OF REAL ESTATE.

## 1. ESTOPPEL AS TO SETTING UP DEFECTS IN TITLE.\*

After a contract of purchase and sale of a lease, and of the demised premises for the unexpired term, the key of the house on the premises was delivered to the vendee, who held on to it until he had obtained the fee from the owner thereof, when he took visible possession.

HELD,

that he was *not estopped* from setting up in an action by the vendor for the specific performance of the contract, that the lease was invalid and void.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

This action was brought to compel the specific performance of the following agreement :

“ Know all men by these presents, that for and in consideration of the sum of five hundred dollars, lawful money of the United States, to us duly paid by Horatio N. Gray, we agree to sell, and by these presents do agree to grant, convey, assign, transfer and set over, unto the said Horatio N. Gray, two indentures of leases, bearing date the second day of October, in the year one thousand eight hundred and forty-six, and November twenty-second, one thousand eight hundred and fifty-nine, made by the corporation of the city and county of New York, State of New York.

“ The conditions of this assignment are, said H. N. Gray to pay seven thousand dollars, and to assume the assessment of opening Lexington avenue ; five hundred dollars to be paid on signing this agreement, fifteen hundred dollars on May 1st, ensuing, and bond and mortgage for five thousand dollars at three years, from May 1st, 1871, with all and singular the premises

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\* NOTE.—See *Bensel v. Gray*, 88 *N. Y. Superior Court*, 447.

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therein mentioned and described, and the buildings thereon, together with the appurtenances; to have and to hold the same unto the said Horatio N. Gray, his assigns, from the 1st day of May, for and during all the rest, residue and remainder yet to come of and in the term of years mentioned in the said indenture of leases, subject nevertheless to the rents, covenants, conditions and provisions therein also mentioned. And we do hereby covenant, grant, promise and agree, to and with the said H. N. Gray, that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and incumbrances whatsoever.

“In witness whereof, we have hereunto set our hands and seals this first day of April, one thousand eight hundred and seventy-one.

“WM. P. SEELEY, [L. S.]

“WM. P. BENSEL, [L. S.]

“*Executors.*”

The leases referred to in the agreement were:

1st. One dated October 3, 1848, for a term of fifty years, given on a sale for the taxes of 1841, 1842, 1843.

2d. One dated November 23, 1861, for a term of five hundred years, given on a sale for the taxes of 1853 and 1854.

The complaint alleged that defendant, on or about May 1, 1871, received from plaintiffs under said agreement “possession of said lot of land, and that thence hitherto he has retained possession of the same.”

The prayer of the complaint was as follows:

“Wherefore they demand judgment against the defendant for the said \$1,500, with interest thereon from May 1, 1871, and that he shall be compelled to execute and deliver to them a bond and mortgage ac-

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according to the requirements of the said agreement ; and that as security for payment by him, according to the terms of the said agreement, these plaintiffs may have a lien upon the said indentures of lease and upon the said lot of land of which the following is a description : All that certain lot of land situated on the southerly side of Eighty-seventh street, between Third and Fourth avenues, containing in width in front and rear, twenty-five feet, six and two-thirds inches, and in depth on each side one hundred feet, eight and a half inches, and the improvements thereon ; and that in the event of failure by the defendant to pay for the same as aforesaid, the same may be sold by and under the direction of this court, the defendant being compelled to unite in such sale, and the proceeds thereof applied so far as necessary to such payment, and that for any deficiency these plaintiffs may have judgment against the defendant and that they may recover against him the costs of this action."

The answer as amended on the trial averred that the contract was one to convey a good and valid title to the premises therein referred to, for the full term of the leases described, and that the consideration paid and agreed to be paid by and in said contract was for said title ; that plaintiffs had no title other than such as they derived under the tax leases mentioned in the agreement, which were void and worthless ; that there was no consideration for said agreement, and that defendant never received, entered into or took any claim, occupation, or possession of said land of or from the plaintiffs or any act of theirs according to, or under or by virtue of said agreement, or any agreement whatever with plaintiffs, but that he did take title and possession from the actual owner of the fee of said lands, of whom he purchased the same after plaintiffs had failed to give him a good and valid title thereto. It also

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averred the payment of the sum of \$500, mentioned in the contract, and the sustaining of damages to the extent of \$250, for examining the title, and of \$500, for removing buildings, and preparing to take possession, which three several sums defendant prayed to counterclaim.

On the trial it appeared that defendant was in possession, that the lot was a part of the Harlem common lands, and was conveyed by the Harlem common commissioners to Dudley Selden by deed recorded Lib. 194 of Conveyances, p. 44, and by Dudley Selden and wife to Isaac Adriance, by deed recorded in Lib. 291 of Conveyances, p. 594. It also appeared that Isaac Adriance had died, leaving a will by which he devised all his property real and personal to his wife, Margaret E. Adriance, which will was admitted to probate October 21, 1862; and that Margaret E. Adriance, by deed dated August 1, 1871, and recorded in the Lib. 1175 of Conveyances, p. 672, for the consideration of \$5,000, conveyed the lot in question to the defendant. There was no proof that Selden or Adriance ever went into actual possession of the lot; the evidence tended to show the contrary. There was conflict of evidence as to under whom and under what defendant entered and the manner of his entry.

There was also evidence as to defects and irregularities in the levying of the taxes for which the premises were sold, in the proceedings for the sale, and in the compliance with the statutes requiring certain things to be done after the sale before the giving of a lease.

The cause was tried at special term without a jury.

The learned judge before whom it was tried, found, as matters of fact:

"I. That the parties entered into the agreement in question.

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“II. That the said leases were irregular and defective, and that the requirements of the statute of 1843 were not complied with ; and that the proceedings taken to authorize the making of said leases on the part of the mayor, aldermen and commonalty were defective or irregular, in these respects, to wit: *As to the first lease.* 1. That there is no certificate of the comptroller of the fact of the service of the notice of redemption, as required by § 24, art. 3, c. 230, *Laws* 1843. 2. The notice of redemption, dated December 11, 1849, signed by Gordon L. Ford, was unauthorized and invalid, and its service a nullity. 3. The taxes for payment of which the lot in this lease was sold were illegally assessed for the years in question, viz. : 1841 and 1842 and 1843. 4. No legal demand for the payment of the taxes for those years was or could be made. 5. The certificate of the assessors attached to the assessment roll and signed by them is not verified or sworn to (53 *N. Y.* 49). 6. No certificate of the assessors is attached to the assessment roll for the years 1842 and 1843. *As to the second lease.* 1. No order was taken by the comptroller for advertising the lands or tenements in said lease described, pursuant to § 1, art. 3, c. 230, *Laws* of 1843. 2. There was no publication of the delivery of the assessment rolls to the tax commissioners three times in each week, in newspapers in New York, employed by the corporation of said city, during the years 1853 and 1854. 3. The notices served requiring payment of the taxes for the years 1853 and 1854, were defective in form and substance and service, viz. : (1) It was not served upon the person from whom the tax was due, nor with sufficient time. (2) It did not specify the amount of the tax. (3) Nor the percentage to accrue thereon. (4) Nor that payment should be made on or before January 1. 4. The redemption notice of February 18, 1862, as served by Phineas C. Kingsland, was irregular in form



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and false in substance. (1) It does not state for what 'taxes and regular rents for Croton water' the premises were sold. (2) It does not state the name of the purchaser of the premises. (3) The notice recites that 'the said premises have been conveyed to me,' and is signed 'Eliza C. Kip.' The conveyance was in fact to Wm. R. Peyton. (4) The notice recites that the premises were sold for taxes and Croton water rents upon the same, without stating for what year or years, and also recites the amount of the taxes and charges as \$31.58, which is incorrect, as shown by the lease. 5. The sale for the year 1859 was irregular, and also the redemption notice. (1) Four lots were sold, of which one was illegal, as exempt from any sale. (2) Two of the lots were redeemed for \$44.49, out of \$88.98, for the four lots sold; the sale as to the other lot was canceled, leaving \$22.24 against the lot in question. The redemption notice erroneously required payment of \$31.58. 6. The demand of the forty-two per cent. upon \$31.58 was unauthorized and invalid. 7. The premises were in occupation, but there is no proof of service of redemption notice upon the occupant by a person residing in the city of New York. 8. There is no proof of proper service of said notice upon the last assessed owner.

"III. That the defendant did not enter into nor take possession of the premises in question, under the contract, but refused so to do when requested by the plaintiffs, and notwithstanding their offer of indemnity; that the delivery of the key of the building situated thereon was not intended to be, and was not accepted as, a delivery of possession of the premises.

"IV. That the defendant did take possession on or after July 15, 1871, under license and authority from Mrs. Margaret Adriance, the owner of the fee, and not otherwise, and that he afterwards acquired

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title to the said premises in fee by conveyance from her, dated August 1, 1871, 'Exhibit E.'

"V. That on or about April 1, 1871, the defendant paid to the plaintiffs the sum of \$500 as part of the consideration of the said contract then executed."

And found the following conclusions of law :

"I. I find that the contract between the parties for the specific performance of which this action is brought, is an undertaking on the part of the plaintiffs to transfer something more than mere municipal corporation tax lease, defeasible under certain circumstances by redemption or otherwise.

"I find that by the terms of the contract the plaintiffs were bound to grant, convey and assign to the defendant not only such indentures of lease, but with them an estate in land, viz.: 'in all and singular the premises therein mentioned and described, and the buildings thereon, together with the appurtenances,' to be held by the defendant and his assigns, from May 1, 1871, for and during the residue of the term of years mentioned in said indentures.

"II. I find that the contract being an executory agreement, for the sale of an estate in land, is not within the prohibitions of the Revised Statutes with respect to the implication of covenants in conveyances of real estate (1 R. S. 738, § 140).

"III. I find therefore that a covenant, that the vendors had a good title not only to the instruments purporting to be the leases, but to the premises therein described, for and during the residue of the term purporting to be granted thereby, is accordingly to be implied.

"IV. I also find that in the case of municipal corporation leases where the contract provides for an assignment not merely of the instruments as such, but of the estate and term thereby purporting to be granted,

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Appellant's points.

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there is also to be implied a covenant that the corporation had the right and power to grant the estate and term, in manner and form as therein expressed.

“V. I find that under the construction of the said contract as above found, the burden of proof was upon the plaintiffs, to show the regularity and validity of the instruments by the tender of which they claim to have sufficiently established performance of or readiness to perform the contract on their part.

“VI. I find that the said leases being defective and irregular, as found in the second finding of fact above stated, were void, and conferred upon the lessees and their assigns no estate, title or interest whatsoever in the premises thereby purporting to be demised, and that there was a failure of the consideration of the said contract of April 1, 1871.

“VII. I find that the defendant is entitled to recover back the \$500 paid by him on account of said contract with interest from the date of payment, and that he should have judgment therefor, and for dismissal of the complaint upon the merits with costs.”

Judgment was entered for defendant accordingly, and plaintiffs appealed.

*Man & Parsons*, attorneys, and *John E. Parsons*, of counsel, for appellant.—I. The contract implied no covenant that the title of the plaintiffs to the lot was good for the demised term. It was error for the special term to hold the reverse of this. 1. That in an agreement to convey tax leases there is no implied covenant of title to the premises, was expressly decided by the court of appeals, in *Boyd v. Schlesinger*, 59 N. Y. 301; *Bensel v. Gray*, 62 *Id.* 632; where, in deciding this very case, the court of appeals affirmed *Boyd v. Schlesinger* as authority, and as requiring the reversal of the decision of the general term.

II. The contract was not, as found by Judge SAN-

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Appellant's points.

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FORD in his opinion, a contract by the terms of which the plaintiffs were bound to grant to the defendant an estate in the lot for the residue of the term of years mentioned in the leases. 1. The contract is written into a printed blank for the assignment of a lease. By it the plaintiffs agreed to *transfer* to Gray the two leases, describing them, and that is all (fol. 44). The contract then goes on to specify the conditions of the assignment; that Gray was to pay \$7,000, &c., &c. After that follow the printed words which would be applicable to an actual assignment, but they have no application to the agreement to assign. The words expressing the agreement to assign, &c., relate to the leases alone. The contract cannot be read in any such way as to make them apply to the lot.

III. It was error for Judge SANFORD to find that Mrs. Adriance was the owner of the fee of the lot, and that Gray acquired title in fee by her conveyance, and that it was under her that he took possession. 1. The lot in question was alleged to form a part of what was formerly known as Harlem commons, in the twelfth ward, of the city of New York (fol. 350). It was one of the lots described in a deed from Dudley Selden and wife, to Isaac Adriance, dated April 23, 1832, and recorded February 8, 1833, in the office of register of the city and county of New York, in liber 291 of Conveyances, p. 594. Neither Dudley Selden nor the Adriances were ever in possession. It was a wild lot (fol. 453), and there was no possession of it until under one of the tax leases Mrs. Kip took possession, erected buildings, &c. At that time the lot was only worth \$300 to \$350 (fol. 450). Title to real estate must originate in actual possession (*Smith v. Lorillard*, 10 *Johns.* 338). Neither the Adriances nor Gray as Mrs. Adriance's grantee would maintain an action of ejectment upon the evidence in the case. It is probably impossible for any body to make out a legal Harlem

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Appellant's points.

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commons title. However this may be, it was not made out in Mrs. Adriance. It is to be observed that the Dudley Selden deed to Isaac Adriance, which conveys a very large number of lots, expresses only a nominal consideration. Isaac Adriance never paid taxes or assessments, and neither he or his family made any claim to the lot until Gray put himself in communication with them (fols. 392-400), he doubtless using the tax leases for which he was to pay \$7,000 as an argument by which to obtain the claimed title in fee for \$5,000. 2. Gray could not, therefore, enter under Mrs. Adriance. She had no title: she was not in possession, and could not give possession to him.

IV. Gray did take possession of the lot under the contract in question. Judge SANFORD was in error in finding the reverse of this. 1. Upon precisely the same testimony, so far as concerns this point, Judge FREEDMAN, on the first trial, found that Gray did enter under this contract, and that, for the purpose of depriving the plaintiffs of their possession and improvements without payment, he held on to possession until he procured the Adriance deed.

V. Gray having put himself in possession under the contract, was estopped from disputing the plaintiff's title. By taking possession he put plaintiffs at this disadvantage, that it was necessary for them, if they sued in ejectment, to succeed upon the strength of their title. This advantage he gained from them under their agreement with him, and it effectually precluded him from disputing the title under which he entered (*Jackson v. Stewart*, 6 *Johns.* 34; *Jackson v. De Walts*, 7 *Id.* 157; *Bk. of Utica v. Mesereau*, 3 *Barb. Ch.* 528; *Jackson v. Hotchkiss*, 6 *Cow.* 401; *Jackson v. Walker*, 7 *Id.* 637, and numerous other cases, laying down the rules in ejectment).

VI. By his deed from the Adriances, according to the finding of Judge SANFORD that it conveyed a title

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Opinion of the Court, by FREEDMAN, J.

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in fee, Gray has himself cured all difficulties in the leases. 1. That deed merged the plaintiff's title, under which Gray entered (4 *Kent's Com.* 99-101; 3 *Greenl. Cr.* 467; *Roberts v. Jackson*, 1 *Wend.* 478; *James v. Morey*, 2 *Cow.* 246, 248, 300; *Clift v. White*, 12 *N. Y.* 519). 2. A purchaser who has entered cannot defeat specific performance by reason of alleged defects which he has cured (*Smedberg v. Moore*, 26 *Wend.* 238). 3. And so Gray's deed put it out of the power of the plaintiff to obtain a title which would cure the alleged defects, and one cannot defend against the performance of a contract on the ground of impossibility which he himself has created (*Chitty on Contracts*, 636, and cases cited; *Fleming v. Gilbert*, 3 *Johns.* 528, 534; *Betts v. Perine*, 14 *Wend.* 219; *Young v. Hunter*, 6 *N. Y.* 203). 4. As Gray took possession without waiting for an actual assignment of the leases, the plaintiffs had until the trial of their action to make their title complete (*Brown v. Haff*, 5 *Paige*, 235; *Reformed Dutch Church v. Mott*, 7 *Id.* 77; *Vielle v. Troy & B. R. R. Co.*, 21 *Barb.* 381; *S. C.*, 20 *N. Y.* 184; *Cleveland v. Burrill*, 25 *Barb.* 532).

VII. Gray has himself obviated the inequitable objection which he himself took. He has quieted all questions of the validity of the leases, and though his purpose in doing so was to consummate the wrong he designed for the plaintiffs, it is just that his act should enure to their benefit.

*Wakeman & Latting*, attorneys, and *Abram Wakeman*, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—Though the defendant may not have entered into actual possession under the contract, it seems clear upon the evidence that, for the purpose of putting plaintiffs off their guard, he held on to the key delivered to him until he

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could make some arrangement with the record-owner for acquiring the fee. Such arrangement he finally succeeded in making and then he took visible possession. But in view of the intimations given by the court of appeals, on defendants' appeal, to the effect, that possession under a tax lease cannot become adverse to the right of the real owner, the conduct of the defendant becomes immaterial, if the contract was as found below. Indeed, if this rule is to govern the case, it is difficult to see how the plaintiffs can have any relief whatever.

Under the changed issues of the case the learned judge below was correct in holding that the contract called for a conveyance of a leasehold interest in the land, and not merely for a conveyance of the paper title.

This being so and the tax-leases being clearly invalid, if plaintiffs could ground no rights upon adverse possession, the defendant was legally justified in doing as he did, however wrong his conduct towards the plaintiffs may have been from a moral point of view.

The case is one involving great hardship to the estate of which the plaintiffs are executors, but in view of the intimations given by the court of appeals by way of admonition, we cannot see how this court can help them.

The judgment must be affirmed with costs.

SPEIR, J., concurred.

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Appellant's points.

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## EDWARD R. DUNHAM, PLAINTIFF AND APPELLANT, v. THE MERCANTILE MUTUAL INSURANCE CO., DEFENDANT AND RESPONDENT.

## EXAMINATION BEFORE TRIAL.

In this case the objections of the plaintiff (a non-resident) to his examination before trial were sustained on the ground that the affidavit upon which the order was granted omitted to state plaintiff's residence, or that inquiry had been made to ascertain it, or that there was difficulty in learning it. It also omitted to state whether plaintiff had appeared by attorney, no name, residence, or office-address of any attorney on plaintiff's behalf appearing in defendant's affidavit. Also, upon the ground that there was no proof of any notice to plaintiff of the order, or that any order, affidavit, or subpoena in relation thereto was served upon him. The affidavit and order were served upon plaintiff's attorney.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal by the plaintiff from an order overruling his objections to the proceedings for his examination before trial.

The defendant obtained an order for the examination of the plaintiff before trial, and on the same day a copy of the order and affidavit on which it was obtained was served on the attorney for the plaintiff. Upon the return of the order the plaintiff's attorney made several objections to proceeding with the examination, which objections are recited in the opinion.

*William G. Peckham, Jr.*, for appellant,—Cited *Beach v. Mayor*, 4 Abb. N. C. 236; *Levy v. Loeb*, and *Corbett v. De Comeau*, *ante*.



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Opinion of the Court, by CURTIS, Ch. J.

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*Scudder & Carter*, attorneys, and *George A. Black*, of counsel, for respondents,—Cited *Peake v. Proul*, 2 *Abb. N. C.* 418; *Webster v. Stockwell*, 3 *Id.* 115; *Friebey v. Branigan*, *Id.* 122; *Wood v. Keal*, *Id.* 122.

BY THE COURT.—CURTIS, Ch. J.—The affidavit upon which the defendant applies for the examination of the plaintiff, fails to comply with the requirements of sections 872 and 886 of the new Code of Civil Procedure.

It omits any statement of the residence of the plaintiff, or that any inquiry has been made to ascertain it, or that there is any difficulty in learning it. It omits to state, whether the plaintiff has appeared by attorney, nor does the name, residence, or office address of any attorney on plaintiff's behalf appear in the defendant's affidavit. There is no proof of any notice to the plaintiff of this order for his examination, or that any order, affidavit or subpoena have been served upon him in respect to it.

To sustain the order under such circumstances, might subject non-resident parties to great hardships. It appears from the defendant's affidavit, that the plaintiff resides in another State, and if so, he is entitled to the protection given him as a non-resident of this State by section 886.

The order appealed from should be reversed with \$10 costs.

SEDGWICK and FREEDMAN, JJ., concurred.

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Opinion of the Court, by CURTIS, Ch. J.

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JEREMIAH B. GRUMAN, ASSIGNEE, &C., OF  
HENRY FITCH, ET AL., BANKRUPTS, PLAINT-  
IFF AND APPELLANT, v. ISAAC T. SMITH,  
DEFENDANT AND RESPONDENT.

CONVERSION.—SALE OF STOCK WITHOUT NOTICE.

Plaintiff's assignors, who were stock brokers, purchased stock for defendant on a margin, and carried the same. Their request for more margin being disregarded, three days after making the same, they sold the stock without notice to defendant, which sale he refused to accept, and thereafter sent defendant an account showing a balance thereon against him, for which this action is brought.

*Held*, that the relation between said brokers and defendant being that of pledgee and pledgor, the sale of the stock without notice to defendant was an act of conversion that debars plaintiff from maintaining this action.

*Also held*, that a subsequent offer by said brokers of stock to replace that improperly sold, was nugatory (see cases cited in opinion).

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal by the plaintiff from a judgment dismissing the complaint.

The facts are stated in the opinion.

*Mr. Van Wyck*, for plaintiff.

*Geo. Putnam Smith*, for defendant.

BY THE COURT.—CURTIS, Ch. J.—The plaintiff's assignors, Fitch & Co., purchased one hundred shares Rock Island R. R. stock for the defendant, on a margin, May 14, 1870, and carried the stock for him. Fitch &

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Opinion of the Court, by CURTIS, Ch. J.

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Co. called for more margin September 8, 1873, and the defendant paid them, September 10, 1873, \$500 additional margin. Fitch & Co. called for more margin September 17, 1873, and not receiving it, three days after, sold the stock without notice to the defendant of the sale, and sent him an account showing a balance against him of \$1,596.29, for which their assignee brings this suit. The defendant refused to accept the sale, and Fitch & Co. then offered to let the defendant have one hundred shares of the stock if he would pay them the balance claimed in their account.

This was a speculative purchase of stock, and the relation between Fitch & Co., the brokers, and the defendant, for whom they acted, was that of pledgee and pledgor. The defendant was entitled to notice of the time and place of sale, and the sale of the stock with an omission to give such notice, was an act of conversion on the part of the brokers, that debars their assignee from maintaining this action against the defendant. Nor was their position altered by their subsequent offer of stock to the defendant upon his paying them the balance claimed of \$1,596.29 (*Markham v. Jaudon*, 41 *N. Y.* 235 ; *Stenton v. Jerome*, 54 *Id.* 480 ; *Baker v. Drake*, 66 *Id.* 518 ; *Taussig v. Hart*, 58 *Id.* 425).

The judgment appealed from should be affirmed with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

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Opinion of the Court, by CURTIS, Ch. J.

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CHARLES W. CLIFFORD, PLAINTIFF AND RESPONDENT, v. ANDREW J. DAM, ET AL., DEFENDANTS AND APPELLANTS.

COAL-HOLE, WHEN CONSIDERED NUISANCE.—PLEADING.—DAMAGES.

A coal-hole in the side-walk, maintained without license from the proper city authorities, is a nuisance, and the party upon whose premises it is, irrespective of his negligence, becomes responsible to any one passing upon the sidewalk who is, without fault on his part, injured by it.

Defendant cannot prove the usual license as a defense to such an action, unless the same was pleaded in his answer.

The court below charged, as to damages, that the jury had "a right to consider the nature of plaintiff's business, its extent, and the time he was prevented from attending to the same." *Held*, correct.

Before CURTIS, Ch. J., and SEDGWICK, J.

*Decided January 6, 1879.*

Appeal by defendants from a judgment in plaintiff's favor, entered upon a verdict for \$600.

The action was brought to recover damages for injuries received by the plaintiff in falling through a coal-hole in the side-walk of defendant's premises.

The answer alleged that the injury was caused by the negligence of the plaintiff.

*George M. Curtis*, for appellants.

*T. Frank Brownell*, for respondent.

By THE COURT.—CURTIS, Ch. J.—The defendants at the trial offered to prove, that at the time of the construction of the building occupied by them, the usual permit in writing was obtained from the proper authorities in the City of New York and paid for, and that under such permit the coal-hole in question was made. This license was not pleaded in the answer, and

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Opinion of the Court, by CURTIS, Ch. J.

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the proposed evidence was for that reason excluded by the court under the defendant's exception. If the defendants had a license from the proper authorities to maintain this coal-hole, they should have pleaded such license in their answer, and the plaintiff would have been notified of the defense upon which the defendants relied, and would have had an opportunity of preparing to meet it at the trial.

This was required under the former system of pleading, and greater reason exists for its continuance under the present system. The defendants were not in a position at the trial to claim that the coal-hole was authorized by competent authority (*Selden v. Delaware & H. Canal Co.*, 29 *N. Y.*, 639; *Beatty v. Swarthout*, 32 *Barb.* 293; *Irvine v. Wood*, 51 *N. Y.* 228).

If this hole was unauthorized, it may be regarded and treated as a nuisance, and the defendants by continuing it on their premises, became responsible to any person passing upon the sidewalk, who might be injured by it, irrespective of any question of negligence on their part (*Congreve v. Smith*, 18 *N. Y.* 82; *Congreve v. Morgan*, 18 *Id.* 85; *Creed v. Hartman*, 29 *Id.* 597; *Irvine v. Wood*, 51 *Id.* 228).

The court excluded testimony offered by the plaintiff at the trial, as to the amount of plaintiff's income from his professional business during 1875 and 1876, but in the latter part of the charge, the jury were instructed as follows :

"Now, to arrive at the amount of damages, if any, he sustained by inability to attend to business, you have a right to consider the nature of plaintiff's business, its extent, and the time during which plaintiff was prevented, wholly or partially, from attending to his business."

To this the defendant excepted.

This portion of the charge is sustained by the views expressed in *Masterton v. Village of Mount Vernon*

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Statement of the Case.

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(58 N. Y. 391), and in *Walker v. Erie R. R. Co.* (63 Barb. 260), and affords a just and reasonable basis for the jury to arrive at the amount of damages sustained by the plaintiff from inability to attend to his business in consequence of the injury.

The amount of the damages found by the jury, when the injury and loss shown to have been sustained by the plaintiff are considered, appears to have been very reasonable.

The exceptions presented in the case fail to furnish sufficient ground for granting a new trial, and the judgment appealed from should be affirmed with costs.

SEDGWICK, J., concurred.

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ANNA ZUGNER, PLAINTIFF AND RESPONDENT, v.  
WILLIAM J. BEST, RECEIVER, &C. GERMAN SAV-  
INGS BANK, &C., DEFENDANT AND APPELLANT.

SAVINGS BANKS.—NOTICE OF TITLE.

In this case plaintiff intrusted to her husband a bond belonging to her, to be deposited in the German Savings Bank for safe keeping, which bond he thereupon took to said bank with plaintiff's bank book, and delivered to the cashier, who placed the bond in the bank safe, and wrote the following memorandum and attached it to said bank book, and returned the same to defendant's husband: "Mrs. Anna Zugner, Morrisania Steamboat Co., No. 1, Bond \$1,000, August 20, 1873."

*Held*, that the said transaction was had with the cashier as an officer of the bank in the line of his duty, and that the bank recognized, and was charged with notice of plaintiff's title to the bond. There was other evidence in the case of notice to the bank's trustees of plaintiff's title. Also, that a subsequent transfer of the bond to the bank by plaintiff's husband was void.

Before CURTIS, Ch. J., and SEDGWICK, J.

*Decided January 6, 1879.*

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Opinion of the Court, by CURTIS, Ch. J.

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Appeal by the defendant from a judgment entered in plaintiff's favor, upon the report of a referee.

The action is brought to recover the possession of a bond for \$1,000 of the Morrisania Steamboat Company, claimed to have been deposited with the German Savings Bank August 20, 1873, for safe keeping, and found there by the defendant when he was appointed its receiver. The defendant claims it was transferred to the bank for a good and valuable consideration. The referee found for the plaintiff, and the defendant appeals.

*William F. Fiero*, for appellant.

*Elial F. Hall*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—There is a difficulty in sustaining the position taken by the defendant, that the transaction of depositing this bond for safe-keeping was between the plaintiff's husband and Hoeland, the cashier of the savings bank, personally, and not as an officer of the bank in the line of his duty, and that therefore the bank was not charged with notice of the plaintiff's title to the bond.

The evidence shows that the bond was bought with plaintiff's money, and was intrusted to her husband to deposit in the bank for safe-keeping. That he thereupon took it to the bank with the plaintiff's bank book, gave the bond to the cashier, who placed the bond in the bank safe and wrote the following memorandum on a card, and pasted it in the plaintiff's bank book and returned it to her husband: "Mrs. Anna Zugner, Morrisania Steamboat Co. No. 1. Bond \$1,000. August 20, 1873, left with the German Savings Bank."

This is the form of the memorandum as stated in the evidence in the case, though the last six words do not appear in the referee's report or in the plaintiff's

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Opinion of the Court, by CURTIS, Ch. J.

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points, but their presence or absence would not affect the conclusion in my mind, that this transaction was with the bank as such, and that the bank had due notice and recognized the title of the plaintiff to the bond as her property solely, and that the referee found correctly in that respect, and in accordance with the evidence.

The defendant claims that the bank in December, 1875, became the owner of the bond, by the transfer of it by the husband to the bank. This view is not free from difficulties. Even if the husband did attempt to transfer the plaintiff's property to the bank, it is apparent that the bank had notice that it was the wife's property, and the proofs establish that she had no knowledge or notice of any such act on her husband's part, that it was unauthorized by her, and that both previously and for some time after, she received the interest coupons through her husband from the bank and caused them to be collected, and that such transfer was without consideration. But irrespective of the above embarrassments affecting the transfer, the weight of evidence is to the effect that the husband, when he attempted temporarily, as he claims, to contribute it towards sustaining the sinking fortunes of the bank, told his associate trustees of the bank that it belonged to his wife. The case discloses how a savings bank can be made to inflict injury and loss on those it should protect. Wherever unsuitable persons are organized under the forms of law, as custodians of the savings of the weak, a court of justice is called on, to narrow, as far as is consistent with law, the area of losses.

The judgment appealed from should be affirmed with costs, to be paid out of the funds in the hands of the defendant as receiver.

SEDGWICK, J., concurred.



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Statement of the Case.

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JAMES LAWSON, ET AL., PLAINTIFFS AND RESPONDENTS, v. HERMAN S. BACHMAN, ET AL., DEFENDANTS AND APPELLANTS.

AGREEMENT, CONSTRUCTION OF.—LIMITATION OF TIME.—REASONABLE TIME, &c.

The agreement of plaintiffs to use their best efforts, and at their own expense, to collect the claim "*in the shortest practicable time*," did not specifically provide for the *duration of time* through which plaintiffs were bound to make efforts, and it was also doubtful whether there was any implied obligation upon the defendants not to empower another agent in the same business. Assuming, however, that the contract created such an obligation, there was no time specified in the contract in which plaintiffs had the right, and should be allowed to act as *sole* agents for the defendants.

Therefore, a reasonable time, under the contract, for each party must be allowed; that is, a period to be fixed according to the circumstances, for the plaintiffs to collect the claim and the defendants to forbear the employment of other agents, and after the expiration of that period the defendants had the right to employ other agents and proceed in the collection of the claim.

*Held*, that under the facts in this case that reasonable time had expired, and defendant's action in the employment of other agents and in the collection of the claim, was justifiable under the contract.

This limitation as to time was a part of this contract, *as matter of law*. The power contained in the contract was not revocable, because of the lapse of time, but it simply expired with the expiration of a reasonable time or period, which the plaintiffs had under the contract to collect the claim.

Before SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal from judgment entered upon a verdict for plaintiff by direction of the court.

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Statement of the Case.

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The action was for compensation for services by plaintiffs, under the following written agreement :

“THIS AGREEMENT, made this 25th day of April, A. D. 1871, between Messrs. Bachman Brothers, of  
and Lawson & Walker, of the city of New York, witnesses : That whereas, the said Bachman Brothers have employed said Lawson & Walker, and authorized them by power of attorney, of even date herewith, to collect our claim arising out of the capture of the ship *Commonwealth* and her cargo, by the armed rebel cruiser the *Florida*, the said Lawson & Walker agree to use their best efforts, at their own expense, to collect the said claim in the shortest practicable time, and to indemnify and save harmless the said Bachman Brothers from and against any and all loss or damage from any of the acts of the said Lawson & Walker in the premises.

“And the said Bachman Brothers, in consideration of the premises, agree to allow and pay to said Lawson & Walker a compensation equal to twenty-five (25%) per cent. of whatever sum shall be collected on the said claim.”

The defendants also made their power of attorney to the plaintiffs, to collect the claim, which was described as it had been in the agreement.

Between the date of the agreement and some day in 1872, when the plaintiffs' firm dissolved and went into liquidation, the defendants handed to the plaintiff the bill of lading and the invoice of the goods destroyed. The plaintiffs filed a notice and abstract of the claim, in the department of State, at Washington, and prepared a memorial stating the circumstances of the claim, which on December 11, 1872, they sent to defendants, but never received it back. They also went to Washington, to ascertain the condition of the case and the prospect of a settlement. The plaintiffs' firm

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Statement of the Case.

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went into liquidation in the year 1872. The testimony did not show what was the legal character of the claim or against what person or government it was made.

Nothing further was done in the matter by plaintiffs, nor communication had between them and defendants until October 19, 1874.

In June, 1874, after the award of the arbitration of Geneva, congress passed the act entitled "An act for the creation of a court for the adjudication and disposition of certain moneys received into the treasury, under an award made by the tribunal of arbitration constituted by virtue of the first article of the treaty concluded at Washington, &c." The act created a court, to pass upon claims for losses by the depredations of the *Florida* and other steamers, and to direct payment of valid claims out of the award.

On October 19, 1874, the plaintiffs, without a request of defendants, prepared a petition for the court, and inclosed it in a letter, which contained "Please return to us, with the petition when signed, the memorial, also signed, which we forwarded you for signature on December 11, 1872, and duplicate copies procured from the court, by which the originals were granted, of your certificate of naturalization." This letter was signed Lawson & Walker, in liquidation.

After this date, but in October, 1874, one of the defendants called upon one of the plaintiffs, and, telling him in substance that the defendants had employed another attorney, requested him to surrender the invoice and bill of lading, and to release them from the agreement. The person representing the plaintiffs surrendered the invoice and bill, but refused to release the defendants. Either before this interview the defendants had employed another person to represent them before the court established by the act, or shortly after it they employed him. In due course, the defendants received the amount claimed by them.

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Opinion of the Court, by SEDGWICK, J.

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The defendants, through their new attorney, prosecuted their case before the court, and collected their damages in the sum of \$3,034.

The plaintiff gave testimony that if they had proceeded to collect, they would have incurred expenses to about the amount of \$125, and the court directed a verdict for them for one-quarter of the amount collected, less this expense.

The defendant took exception, having asked for a dismissal of the complaint.

*Chas. F. MacLean*, for appellants.

*Frederick B. Jennings*, for respondents.

BY THE COURT.—SEDGWICK, J.—The agreement of the plaintiffs, “to use their best efforts, at their own expense, to collect the said claim in the shortest practicable time,” did not specifically provide for the duration of time through which they were bound to make the efforts. It is very doubtful, at least, whether there was any implied obligation on the part of the defendants, not to empower another agent in the same business. Assuming that there was, there was no time specified in which they were to allow the plaintiffs to act as sole agents. Therefore, the one could only claim a reasonable time, *i. e.*, a period to be fixed according to the circumstances, in which to collect the claim, and the other had the right, after this reasonable time, to proceed in his own way by other agents to collect the claim. This limitation as to time was a part of the contract as matter of law, and the power was not revocable because of the lapse of time but then expired.

After the defendants omitted to sign and return the memorial sent to them December 11, 1872, the plaintiffs did nothing in act or word for two years. This want of action was not due to the defendants retaining

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Opinion of the Court, by SEDGWICK, J.

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the memorial. There was nothing to be done, and the memorial would have served no other purpose than was accomplished by filing the abstract of the claim in the State department. I am of opinion, that after so much time, the agreement was at an end. It is also manifest, from the circumstances, that not only had the time which the law provided passed, but that the plaintiffs had ceased their efforts, and could not have, through the two years, done any service which would have had any effect in prosecuting the claim or securing its success. So far as the testimony shows, or we may judge from the character of the case, there was nothing to be done. The defendants, therefore, had the right, which they used, of employing another attorney, and the plaintiffs' refusal to recognize this right did not affect its validity.

If this conclusion were not correct, the combination of considerations in the case, viz.: the lapse of time, the agents going into liquidation, the change in the intrinsic character of the claim, from a claim against some government, resting upon general principles of international obligation, to a claim against a fund, which was not brought into existence by any effort of the plaintiffs, would convince me that the agreement had expired by its own limitations before the time, in 1874, when the plaintiffs, without request of defendants, attempted to begin a new prosecution of the claim for damages.

The judgment should be reversed, and a new trial ordered, with costs of appeal to appellant to abide the event of the action.

FREEDMAN, J., concurred.

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Statement of the Case.

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**HUBBARD N. MITCHELL, PLAINTIFF, v. THOMAS CORNELL, ET AL., DEFENDANTS.****CONTRACT, DAMAGES FOR BREACH THEREOF.—CHARTER OF STEAM-BOAT, &C.**

In the case of the charter of a steamboat to be used in the excursion business on the Hudson River, and other specified waters, at a specified sum per week, a breach thereof was alleged and established as against the owners, the defendants, who took possession of the steamboat and deprived the plaintiffs of the same.

*Held*, as to the question of damages, that unearned and speculative profits cannot be included as a part of the damages to be recovered (*Wehle v. Haviland*, 69 *N. Y.* 451).

The rule of damages in favor of the plaintiff in this case is,

1. The market value of the charter, with its limitations and conditions for its unexpired term.
2. Or the difference (if any) between the price named in the charter and the price that plaintiffs would have to pay in order to hire another equally good steamboat for the business, with a suitable compensation for the plaintiffs' time, trouble and expense in obtaining such other boat.
3. Or the difference between the price to be paid by plaintiffs under the charter, and the market value of the use of the boat, through the unexpired term of the charter for the excursion business, if there was such a value (*Blanchard v. Ely*, 21 *W.* 342; *Clark v. Maugha*, 1 *Den.* 317; *Griffin v. Colen*, 16 *N. Y.* 491; *Rogers v. Beard*, 36 *Barb.* 31; *Cassidy v. Le Fever*, 45 *N. Y.* 562; *Allen v. Fox*, 51 *Id.* 562).

The offer of plaintiffs to prove what would have been the profits of an excursion business, carried on with the steamboat in question, on objection, was properly overruled.

The offers of plaintiffs to prove, 1. That there were opportunities to charter the boat for excursions, &c. 2. What was the market value of a boat of that kind for excursions, &c.; and in connection with this testimony to show the daily expense of running the boat, claiming that the evidence thus offered would show profits, &c., were improperly excluded; because this evidence would have properly established the market value of the use of the boat for the unexpired term of the charter.

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Statement of the Case.

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Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Exceptions ordered to be heard at general term, in the first instance, complaint being dismissed.

The complaint alleged that the parties entered into an agreement in writing whereby the defendant chartered the steamboat the *William Cook*, her engine, &c., unto the plaintiff for ninety-two days, from June 8, 1875, to September 7, 1875, the said boat to be used in the excursion business on the Hudson River and other specified waters, the plaintiff to pay \$130.43 for each day, payments to be made on Monday of each week; paying forthwith \$1,000 as a guarantee against loss by defendants: and further it was agreed that in case of failure to pay the charter money on every Monday the defendant might at their option take possession of said steamboat on the following day after such failure, and that the plaintiff should be responsible for all damages to said steamboat, except breakage of machinery, and all damages to other vessels or the property of other parties, unless such damages should result from the management or action of the pilot or captain; that the plaintiff went into possession of the boat and performed the agreement on his part; that on July 15, 1875, the defendants "unlawfully and wrongfully dispossessed the plaintiff of said steamer and took possession of the same, against the wishes and protest of plaintiff, and converted the same to their own uses and purposes; thereby depriving the plaintiff of all authority or power whatsoever over the said boat, involving the utter ruin of his business, and subjecting him to great pecuniary embarrassment and loss. By reason whereof the plaintiff has been subjected to damages amounting at least to \$7,000 and upwards."

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Opinion of the Court, by SEDGWICK, J.

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The answer denied the unlawful and wrongful dispossession and conversion, and alleged that the defendants took possession of the boat by virtue of the agreement, the plaintiff having omitted to make the payment provided.

On the trial the plaintiff proved the charter, and taking possession of the boat; he also gave evidence tending to prove that he made payments in accordance with a verbal arrangement with the defendants, which entitled him to remain in possession of the steamboat, but that the defendants believing that due payment had not been made, took possession of the boat on July 15, 1875, and kept him out of possession thenceforward.

Certain questions were asked and offers made, in reference to the damages, which were the basis of the exceptions noticed in the opinion of the court. The plaintiff giving no other proof of damage, the complaint was dismissed and the exceptions were ordered to be heard at general term in the first instance.

*A. J. Vanderpoel and A. N. Weller, for plaintiff.*

*Benedict, Taft & Benedict, for defendants.*

BY THE COURT.—SEDGWICK, J.—The complaint did not charge and the proof did not show, that the defendants' act in taking possession of the steamboat was malicious. The measure of damages therefore was compensation to the plaintiff, assuming that he had a cause of action, and unearned and speculative profits cannot be included as a part of the damages to be recovered (*Wehle v. Haviland*, 69 *N. Y.* 451). This is a specific rule to be followed here. This case is not one of trespass, the direct and immediate consequence of which was the breaking up of a business. There was no direct interference with the plaintiff's excur-



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Opinion of the Court, by SEDGWICK, J.

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sions. If the boat had been taken by the defendants when he had upon it a large number of people, ready to make an excursion, and the excursion being on foot was directly broken up, a question not in the present case would have been presented. The plaintiff was deprived of the use of the boat for excursions. But there was no proof that he could not, for that reason, continue his business of gaining profits from organizing excursions. The presumption is, in a commercial port like New York, and it is a matter of common knowledge, that other boats could be hired, fitted for plaintiff's purposes.

I am of opinion therefore that the plaintiff could have as damages (if the defendants' act was wrongful), 1st, the market value of the charter, with its limitations and conditions for its unexpired time, if there were such a value; 2d, or the difference (if any) it would require to be paid to hire another equally fit boat, and a compensation to be fixed by the jury for the plaintiff's time and trouble in procuring another boat; 3d, or the difference between the price to be paid by plaintiff under the charter-party and the market value of the use of the boat through the unexpired time of the charter, for the purposes of excursions, if there were such a value (*Blanchard v. Ely*, 21 *W.* 342; *Clark v. Marsiglia*, 1 *Den.* 317; *Griffin v. Colver*, 16 *N. Y.* 491; *Rogers v. Beard*, 36 *Barb.* 31; *Cassidy v. LeFevre*, 45 *N. Y.* 562; *Allen v. Fox*, 51 *Id.* 562). The plaintiff was not entitled to evidence offered to show the probable future profits. They were uncertain and contingent, depending upon weather, the whim of people seeking pleasure, and other accidental facts.

In *Durkee v. Mott*, 8 *Barb.* 426, the court held that the plaintiff might recover what he would have made if the defendant had kept the contract and paid what, by the contract, he had promised to pay. This would have called upon the plaintiff to prove certain

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Opinion of the Court, by SEDGWICK, J.

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matters of expenses, viz.: labor, which are not uncertain and contingent so far as they affected the measure of damages in plaintiff's favor. The damages had regard to the very subject-matter of the contract and not to a remote and only possible consequence of a breach.

In *Bagley v. Smith*, 10 *N. Y.* 489, the damages were held to be compensation for a loss of future profits, because the loss was a direct and immediate consequence of a breach of the contract, which was made by both parties with reference to future profits.

In *Marquart v. La Farge*, 5 *Duer*, 565, it was assumed, on the facts of the case, that the immediate, direct, and necessary consequence of the defendant's tort was a breaking up of plaintiff's business, and that the value of the good-will of the business could be recovered. The court therefore sustained the admission of evidence as to the character of the business before the trespass, intimating that testimony being in substance a calculation of future or probable profits, would not have been allowed.

I am therefore of opinion that the plaintiff's offer of testimony to prove what would have been the profits of an excursion business carried on with the boat was properly overruled. The testimony as to the profits immediately before the defendants took possession was irrelevant and immaterial, because the plaintiff was not entitled to a recovery for the breaking up of a business, for which the defendant was not liable.

But I am constrained, from the case as settled, to think, that certain evidence offered by plaintiff, as to the value of the use of the boat for the unexpired time of the charter-party was excluded, which should have been allowed.

While the plaintiff was on the stand he was asked on his own behalf, Were there opportunities after July 15, down to September 7, to charter the boat, the

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Opinion of the Court, by SEDGWICK, J.

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*William Cook*, for excursions beyond those mentioned in a certain list that had been given in evidence, of excursions for which the boat had been taken by third parties? Upon defendant's objections the question was excluded. The plaintiff's counsel then, in the words of the case, proposes to prove the market value of a boat of that kind, for excursions similar to those mentioned in the list, and in addition to that, offers to show the daily expenses of running the boat, and claims that the boat could be chartered for more than it would cost to run the boat and the rent of the boat. An objection to the witness not being competent to express an "opinion on the subject" had been waived. The testimony would have gone to show what was the market value of the use of the boat for the unexpired time of the charter. He should have been allowed to prove this, as the breach had directly deprived him of the use. There was nothing uncertain or speculative in that, or in the running expense which it was proposed to deduct.

I regret to come to this conclusion, for having tried the case once, and in considering what has been the nature of the real dispute between the parties, I am inclined to think that the plaintiff does not actually rest his claim to damages upon the kind of proof now in question, but the point was fairly made upon the trial, and here the plaintiff is entitled to a new trial, if the exception is good, as I think it is.

Later in the trial, the plaintiff was asked in his own behalf what it would have cost to hire a boat after the defendants took possession for the unexpired time, or a charter like the one in suit. The subject-matter of the inquiry was proper, but the question was properly excluded, as the defendants then took an objection that the witness had not sufficient knowledge or experience to answer the question, and in fact it appeared that he had not.

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Statement of the Case.

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The exception as to the value of the use of the boat from July 15 to September 7 being sustained, there should be a new trial, with costs to abide the event.

FREEDMAN, J., concurred.

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DAVID THOMSON, ET AL, PLAINTIFFS AND RESPONDENTS, v. THE LIVERPOOL AND GREAT WESTERN STEAM CO. (LIMITED), DEFENDANT AND APPELLANT.

BILL OF LADING.—NEGLIGENCE OF CARRIERS.—MOTION FOR DIRECTION OF VERDICT, EFFECT OF.

Plaintiff shipped certain goods upon one of defendant's steamships, under a bill of lading containing the following clause:—

“Goods to be taken by consignee immediately, &c., otherwise they will be landed by the master *and deposited at the expense of the consignee and at his risk, &c., in the warehouse provided for that purpose, or sent to the public store, as the collector of the port shall direct, &c. &c.*”

Upon the arrival of the vessel, defendant notified the consignee that said goods were upon its (defendant's) dock, and that they must be removed during the day; that the company would no longer be responsible for them. They were not removed, and remained there during the next day, at which time a portion of the same were stolen, without negligence on the part of defendant.

*Held*, that the defendant was liable, under the above clause of the bill of lading, for damages for non-delivery.

When counsel for each party moves upon the trial for a direction to the jury in his favor, all questions of fact are thereby submitted to the judge; and his finding of any fact necessary to the direction he makes, is conclusive.

Before SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal by defendants from judgment entered on verdict and from order denying motion for a new trial made upon the minutes.

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Statement of the Case.

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The action was for damages for non-delivery upon demand of twenty ingots of tin, of value of \$239, consigned to plaintiffs and shipped upon the steamship of defendant under a bill of lading which contained the following clause, viz: "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, otherwise they will be landed by the master, and deposited at the expense of the consignee and at his risk of &c., in the warehouse provided for that purpose, or sent to the public store, as the collector of the port shall direct, and when deposited in the warehouse to be subject to storage; the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship."

The answer in substance was that on the arrival of the vessel the tin was placed upon defendant's dock in good order and that said dock is reasonably well protected and guarded against damage by weather or loss by theft: that thereupon and about noon of Saturday, March 4, 1876, the defendants notified plaintiffs they must remove said tin on that day, that defendants did not wish the tin to remain on its dock over the following Sunday, and defendant refused to be responsible for the custody of the tin after that day; that defendants expecting and believing that plaintiffs would remove the tin on Saturday took no steps toward depositing the same in any warehouse; that plaintiff did not remove the tin on the Saturday, and that during the night of Sunday the tin was stolen from the dock by river thieves, without any fault or negligence on the part of defendants.

The testimony may be stated for the purpose of this appeal, as showing that the plaintiff had notice of arrival of the tin about noon of Saturday, and that thereafter the goods remained ready for delivery down to the close of business hours on Saturday; and that

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Opinion of the Court, by SEDGWICK, J.

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this was a reasonable time to give the plaintiffs to remove the tin; that the tin remained on the wharf over Sunday; that the wharf had special protection against thieves, and two watchmen were employed, but that on Sunday night it was stolen.

The judge directed a verdict for the plaintiff, and a motion upon the minutes for a new trial was denied.

*A. C. Merrett*, for appellants.

*James Thomson*, for respondent.

BY THE COURT.—SEDGWICK, J.—The course taken upon the trial by the learned counsel for the respective parties, made a very narrow question for the judge at the trial and for this court on appeal. Each counsel moved for a direction to the jury in his favor. All questions of fact were thereby submitted to the judge and his finding as to any fact necessary to the direction he did make is conclusive.

The defendant's counsel moved on specific grounds, thereby turning the attention of the judge away from all other grounds. The first two grounds were that plaintiff had notice of arrival and had reasonable time to remove. The learned court, on the facts, acceded to these propositions. The sole remaining ground was that thereafter the goods were stolen without any negligence by defendants. To this the court did not agree. The court made some remarks in giving a direction for the plaintiff. They were concise and suggestive—as the custom is upon a trial—and were not meant to be exhaustive. If they had not been made the inference would have been that the court may have found as a fact, that the loss by theft occurred from the negligence of defendants, and this would be conclusive. It appears from the opinion of the court, however, it deemed that after responsibility as carrier ended, that is, when reasonable time had passed after

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Opinion of the Court, by SEDGWICK, J.

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notice to remove, there was a specific contract duty on the part of defendants to store in a warehouse; that the bill of lading substituted the particular duty of seeing that the goods had the special protection of a warehouse, in the place of the general obligation of a bailee or warehouseman, or of providing a safe place of deposit. In the latter case, it would be a question of fact as to whether the carrier had fulfilled the general obligation, by allowing the tin to remain on the dock, under the circumstances, and one of the facts to be considered would have been whether the goods could have been sent to a warehouse before Sunday, if giving reasonable time to remove required that they should remain ready for delivery through the business hours of Saturday.

On the terms of the bill of lading, this view should be sustained. It said, in substance, that unless the goods are taken from alongside immediately after the vessel is ready to discharge, "they will" be "deposited in the warehouse provided for that purpose." The agreement to deposit in a warehouse has the quality of a contract, and the promise must be fulfilled. This construction is reasonable in view of what would have been the duty of the defendants, if the special clause had not been made. That duty would have been, to provide a proper place of deposit for the goods, he not being at liberty to leave them on a wharf (*Redmund v. S. N. Y. & P. Steam Co.*, 46 *N. Y.* 583). It intended only to state a general rule, but not to intimate that if no contract had been made, that it would under any circumstances or the facts of this particular case be a breach of duty, to leave goods properly guarded on a wharf, with special protection.

The bill of lading in express and unconditional terms shuts in the parties to a special mode of performance of the duty; viz., the carrier is to place the goods in a warehouse.

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Statement of the Case.

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The judge found, therefore, and correctly, that the goods being on the wharf was a breach of defendant's contract, and their then having been stolen is not an excuse for the non-performance of the obligation to deliver.

The other exceptions have been examined, but on the law as above stated they were either not material or were not well taken.

The judgment and order appealed from are affirmed with costs.

FREEDMAN, J., concurred.

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EDWARD MARCUS, PLAINTIFF AND RESPONDENT,  
v. JOHN THORNTON, ET AL., DEFENDANTS  
AND APPELLANTS.

SALE AND WARRANTY OF QUALITY.—BY SAMPLE.—WHEN EFFECTED  
BY A BROKER.

It is a general rule, that when a contract of sale has been effected and concluded by parties through the agency of a broker, that the broker's memorandum of sale, and the bought and sold notes, constitute the evidence of the contract, and no parol evidence is admissible to vary the same. But when (as in this case) it is a contested question of fact whether or not the sale was effected and concluded through the agency of a broker, that question should be submitted to the jury.

It is only in cases of executory contracts, and without warranty, that a purchaser accepting goods and retaining them, without notice to the seller or offering to return them within a reasonable time, is held to waive all defects as to their quality, &c. (see cases cited in opinion of court).

In case of a warranty, the purchaser is not bound to accept what he did not buy; and if he does accept, he has a right to recoup the damages arising from a breach of the warranty (*Day v. Pool*, 52 N. Y. 416; *Downce v. Dowe*, 57 *Id.* 16).



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Opinion of the Court, by FREEDMAN, J.

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Before CURTIS, Ch. J., and SEDGWICK and FREEDMAN, JJ.

*Decided January, 6, 1879.*

The action was brought to recover the value of one hundred and two cases of Japan ear-shells, sold and delivered to the defendants at the agreed price of sixteen cents per pound.

The answer admits the purchase, but avers that the defendants were induced to make it by reason of the fraudulent representation of the plaintiff's agent, and upon the express warranty that the bulk not examined was like some cases which were opened and inspected; that the shells contained in the cases thus opened and inspected were sound, but that the bulk was subsequently found to be worm-eaten and of greatly inferior value.

Upon the trial testimony offered by the defendants to show the unsoundness of the bulk and its inferior value was excluded, and a verdict directed for the plaintiff, to which rulings the defendants duly excepted.

The defendants requested the court to submit the case to the jury. The court denied the request, and defendants again excepted.

Judgment having been entered, the defendants appealed.

*Cook & Schuck*, attorneys, and *Peter Cook*, of counsel, for appellants.

*Lauterbach & Spingarn*, attorneys, and *S. Spingarn*, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—It is true, as a general rule, that when a contract of sale is effected by a broker, the memorandum of sale and the bought

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● Opinion of the Court, by FREEDMAN, J.

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and sold notes are the evidence of the contract, and that when there is no variance between said notes, no parol evidence is admissible to vary the contract.

But the first question in this case is, whether the contract of sale was effected by the broker, or made independently of him by and between the parties themselves.

Upon the trial the testimony introduced by the defense showed :

That the plaintiff is a resident of London, but carries on business in the city of New York, as a merchant, through Charles Loewenthal, his agent. The defendants also are merchants, having a store in the city of New York, and another in the city of Philadelphia. In response to a letter written by Loewenthal, dated November 7, 1877, advising the arrival of the shells and requesting an early call, John Thornton, Jr., one of the defendants, called at plaintiff's office in the city of New York at about half past ten o'clock in the morning of November 8. Loewenthal then and there said to him that Mr. Ostheimer of Philadelphia, a competitor in business with defendants, had called that morning and would be back at twelve o'clock to take the shells, if the defendants did not desire them ; but that he had been put off until that time, because Loewenthal desired to give defendants the preference. Thornton being desirous of purchasing, Loewenthal suggested that he should at once go down to the wharf to look at the shells. Thornton assented to this proposition, and Abecasis, a broker, was sent for by Loewenthal to accompany Thornton, which he did. The shells were found on the dock piled up in cases, and Abecasis hired a cooper to open some of them. Only six cases, selected by Abecasis and thus opened, were examined, and then Thornton inquired whether the balance would run the same. Abecasis assured him that they would, whereupon Thornton returned to the office to complete

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Opinion of the Court, by FREEDMAN, J.

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the trade with Loewenthal before Ostheimer should come back. While there some further discussion ensued between Loewenthal and Thornton, and the broker, who had also returned, and Thornton again asked whether all the shells ran like those that had been shown on the dock. The case does not show precisely to whom this question was addressed or what the answer was, but the defendants, on the direction of a verdict against them, are entitled to the inference that the question was addressed to Loewenthal, and that Thornton received from him an answer which was accepted as satisfactory. The bargain was then finally concluded that the defendants should take the one hundred and two cases of shells at the price of sixteen cents per pound, and that the goods should be sent partly to Philadelphia and partly to defendant's store in New York. Now, Thornton swears that he concluded the bargain with Loewenthal, and not with the broker; that there was no necessity for a broker; and that the broker's note was not received until two days thereafter. Loewenthal himself, when called as a witness for the defense, testified that he sold the shells. It also sufficiently appears, or at least the case is susceptible of the inference, that the defendants received the broker's note and discovered the fact that the shells did not correspond in quality with those which had been exhibited on the dock, at about the same time, and that thereupon they immediately repudiated their purchase on the ground of such want of correspondence, and offered to return the goods, which offer was declined by the plaintiff.

Though, therefore, the broker had testified that the sale had been made by him, yet in view of the facts as stated, the defendants had a right to have the following questions submitted to the jury:

1. Whether the contract was made with Loewenthal or the broker;

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Opinion of the Court, by FREEDMAN, J.

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2. Whether, as made, it contained a warranty ; and,

3. Whether they were induced by any false representation or warranty to refrain from examining more than the six cases, and to conclude the bargain which they did make, without such further examination.

It is only in cases of executory contracts and without warranty, where, after a reasonable time and opportunity for the examination of the goods has been given, the purchaser fails to return them or to notify the seller to take them back, that the purchaser, by accepting and retaining them, is held to have waived all defects in their quality (*Reed v. Randall*, 29 *N. Y.* 358 ; *Gaylord Manufacturing Co. v. Allen*, 53 *Id.* 515 ; *Weaver v. Wisner*, 51 *Barb.* 638 ; *Leavenworth v. Parker*, 52 *Id.* 132 ; *Sprague v. Blake*, 20 *Wend.* 64).

But in case of a warranty, not only is the purchaser not bound to accept what he did not buy, but if he does accept, his right to recoup the damages arising from a breach of the warranty survives the acceptance (*Day v. Pool*, 52 *N. Y.* 416 ; *Dounce v. Dowe*, 57 *Id.* 16).

From the foregoing premises it follows that the ruling under which the defendants were held bound absolutely by the broker's note, constituted error. The evidence as to bad quality and inferior value, which was excluded by the court, should have been admitted, and the case should have been submitted to the jury in its different aspects under proper instructions.

The judgment must be reversed, and a new trial ordered, with costs to appellants to abide the event.

SEDGWICK, J., concurred.

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Statement of the Case.

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ANDREW J. PARKER, PLAINTIFF, v. WILLIAM  
C. CONNER, SHERIFF, &C., DEFENDANT.

PERSONAL PROPERTY, UNLAWFUL TAKING AND DETENTION OF.—EXECUTION.—SHERIFF'S SALE.—FACTS IN MITIGATION OF DAMAGES.

Liability incurred by a sheriff in the taking and detention of property cannot be discharged by any act of his own, without the assent of the owner of the property. A return of the property, without such assent, will not release the sheriff, nor will a subsequent levy and sale under process in favor of the sheriff afford him any protection as against the first unlawful taking (See numerous cases cited in the opinion of the court).

But, as an exception to the above general rule, it is equally well-settled, that if the property be taken again from the trespasser, without his agency or connivance, and by the act of a third person and the operation of law, and applied to the owner's use, although without the latter's consent, the jury, in estimating the damages of the owner, may take into consideration, as mitigation of the same, such a taking of the property and its application to the owner's use and benefit. Such application is held to be equivalent to a return of the property, and its acceptance by the owner (See cases cited by the court).

It is not the fact of the subsequent seizure that gives this defense, but that it has been seized under such circumstances that the owner has had or could have the benefit of it (*Bull v. Liney*, 48 *N. Y.* 6).

It matters not whether such mitigating circumstances occurred before or after the commencement of plaintiff's action (*Dailey v. Crowley*, 5 *Lans.* 301).

In this case the sheriff took the plaintiff's property from his possession, at One hundred and twenty-first street, New York, June 30, 1874, removed the same to Duane street, and on July 22, 1874, sold the same to one McLoughlin for \$225, assuming to take and sell the property under an execution in his hands, against one John Halloran, from whom the plaintiff had previously acquired title to the property. On August 12, 1874, the sheriff received an execution against the plaintiff in favor of one Percy, and thereupon he levied upon the same property

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Statement of the Case.

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under and by virtue of this last execution, and sold the same again to the said McLoughlin, the former purchaser, for the sum of \$5.

*Held*, 1st. That this was not a fair sale, as against the rights of plaintiff that had then accrued, because the value of the property had been seriously affected by its removal and former sale to McLoughlin.

2d. That even upon the assumption that this second levy and sale was a taking of the property by a third person within the meaning of the exception stated, that the defendant did not prove an amount exceeding \$5 in mitigation, under the rulings in the case of *Ward v. Benner* (31 *How.* 411), wherein it was held that the measure of damages was the actual value of the property, at the time of the illegal taking, less the amount which it produced at the sale.

Before CURTIS, Ch. J., and SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

The action was brought against the defendant as sheriff for unlawfully taking and carrying away the contents of a certain printing establishment owned by the plaintiff, and of the value of \$9,500.

The defendant justified—

1. Under three several executions against the property of one John Halloran, under which the property was originally seized ; and

2. Under an execution against the plaintiff himself, under which his right, title and interest in and to said property were sold.

Upon the trial it appeared : That on June 30, 1874, the whole property was taken from the plaintiff's possession by the defendant under an execution for \$1,031.03 against John Halloran.

On July 1, 1874, a judgment was entered in the marine court against John Halloran, defendant, in favor of John W. Brown, plaintiff, for \$1,125.23, and execu-

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tion issued thereon on the same day to the defendant as sheriff.

On July 8, 1874, another judgment was entered in the marine court against John Halloran, defendant, in favor of Edward Sheey, plaintiff, for \$536.95, and execution issued thereon on the same day to the defendant as sheriff.

On July 22, 1874, the defendant sold the property under the first execution as the property of said Halloran; and such sale, according to defendant's return, did not realize more than enough to pay the expenses of the sale and the sheriff's fees.

On July 30, 1874, the plaintiff commenced this action.

On August 1, 1874, an execution for \$2,000 against the plaintiff in this action, at the suit of one John Percy, was received by the defendant, under which he claimed to have again levied upon said property, and that he sold the right, title and interest of the plaintiff therein for the sum of \$5, and applied the same to the payment of his fees.

The execution last referred to was against plaintiff's objection and exception, received in evidence as matter in-mitigation of plaintiff's damages.

Upon the close of the whole case the court directed a verdict in favor of the plaintiff for \$55, being the interest upon the value of the property, as proved, during the period of its detention in the hands of the sheriff after its original taking up to the time of the levy under the Percy execution, to which direction the plaintiff duly excepted.

Plaintiff requested the court to direct the jury to find a verdict for the plaintiff for the value of the property, or to submit the question of damages to the jury, which requests were refused, and the plaintiff duly excepted.

The jury then rendered a verdict for the plaintiff

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Opinion of the Court, by FREEDMAN, J.

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for \$55, as directed by the court, and the court directed the exceptions taken by the plaintiff to be heard in the first instance at the general term, and the judgment to be in the meantime suspended.

*George Wilcox*, attorney for plaintiff.

*Vanderpoel, Green & Cuming*, attorneys ; *Almon Goodwin*, of counsel, for defendant.

BY THE COURT.—FREEDMAN, J.—The court below held that the defendant wrongfully, and without authority of law, seized upon and removed plaintiff's goods, and that consequently the plaintiff was entitled to recover for the wrongful taking and detention ; but that the amount of such recovery must be nominal, because the appropriation of the property to the use, benefit and advantage of the plaintiff under the Percy execution was an appropriation under valid legal process against him, and hence in judgment of law was equivalent to its return and acceptance by him.

The case having been disposed of solely upon this theory, and plaintiff's exceptions having been ordered to be heard in the first instance at the general term, the only question presented for the consideration of this court is : What effect, if any, does the Percy execution, and the proceedings thereunder, have upon the defendant's liability in this action ?

The action, as brought, is for the unlawful taking and the detention of plaintiff's property, and for that the liability of the defendant as a trespasser, and the rights of the plaintiff against him, were complete on June 30, 1874. Defendant's liability then was co-extensive with the value of the property taken. From that liability he could not discharge himself by any act of his own without the assent of the plaintiff. Even a return of the property without an acceptance



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by the plaintiff, would not have had the effect of releasing him. So if he had procured the property to be afterwards seized and sold under process in his own favor, such proceeding would have afforded him no protection in any form. This is the settled law of this State, however different the rule may be elsewhere (*Wehle v. Butler*, 61 *N. Y.* 245; *aff'g S. C.*, 35 *N. Y. Sup'r Ct.* 1; *Hanmer v. Wilsey*, 17 *Wend.* 91; *Otis v. Jones*, 21 *Id.* 394; *Lyon v. Yates*, 52 *Barb.* 237; *Peak v. Lemon*, 1 *Lans.* 295; *Livermore v. Northrup*, 44 *N. Y.* 107; *Tiffany v. Lord*, 65 *Id.* 310).

As an exception, however, it is equally well settled, that whenever it appears that the property was taken again from the trespasser without any agency or connivance on his part, and applied to the owner's use, although without the latter's consent, by the act of a third person and the operation of law, the jury may take the taking of the goods by such third party, and the application that was made to plaintiff's use, into the account in estimating plaintiff's damages. In such a case the application to plaintiff's use is held to be equivalent to a return of the property and its acceptance by the owner. But in every such instance it must appear that the subsequent taking by such third party was independent of any agency on the part of the defendant, and that there was in point of fact an application to plaintiff's use (*Higgins v. Whitney*, 24 *Wend.* 379; *Sherry v. Schuyler*, 2 *Hill*, 204; *Ball v. Liney*, 44 *Barb.* 505; *Ward v. Benson*, 31 *How.* 411).

When these facts do appear, the wrong-doer can set up this subsequent seizure and application not as an entire defense, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of the property after he has thus had the benefit of it. It is not the fact of the seizure that gives the defense, but that it has been seized under such cir-

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cumstances that the owner has had, or could have, the benefit of it (*Ball v. Liney*, 48 *N. Y.* 6).

And whenever the defendant, under his answer, is entitled to rely upon any such matter in mitigation, it seems that it makes no difference whether the mitigating circumstances occurred before or after the commencement of plaintiff's action (*Dailey v. Crowley*, 5 *Lans.* 301).

The law being as stated, and there having been no return of the property and an acceptance by the plaintiff, it only remains to be seen whether the defendant has brought himself within the exception as stated above.

According to his own showing he took the property from plaintiff's possession in One Hundred and Twenty-first street, near Third avenue, on June 30, 1874, under an execution for \$1,031.03 against one John Halloran, from whom plaintiff had acquired title; he removed the property to a storeroom at No. 62 Duane street; and at said place, on July 22, 1874, he sold all the right, title, and interest of Halloran in and to the said property to one George H. McLoughlin for the sum of \$225, which sum, as he says, was no more than enough to pay the expenses of such sale and his own fees. This being so, the other two executions against Halloran require no notice or consideration whatever. The sale made as described conferred upon McLoughlin as purchaser not only all the right, title, and interest which Halloran had in the property, if any, but also all the rights as to remedies of the creditor named in the execution under which the sale took place (*Sands v. Hildreth*, 14 *Johns.* 493; *Porter v. Parmley*, 52 *N. Y.* 185).

Having thus entangled plaintiff's property by his own wrongful act, it is difficult to perceive how, without a surrender of the property and a waiver of his rights by McLoughlin, a fair application in fact to plaintiff's use could subsequently be made of it. True,

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the defendant claims, that when on the 1st of August following he received the execution against the plaintiff and in favor of Percy, he again levied upon the property, and that he subsequently sold all the right, title, and interest of the plaintiff therein. But this sale, as against plaintiff's rights then accrued, was not a fair sale, because the value of the property had been, and then was, seriously affected by the claim of McLoughlin to it under and by virtue of the preceding sale. This is plainly apparent from the fact that this property, consisting of one steam engine, four printing-presses, with the necessary shafting and belting, and a lot of type and a great many other articles making up a printing establishment, and which it had taken the defendant several days to remove from plaintiff's premises, was knocked down for the paltry sum of \$5, and that even that bid could be obtained from no other person than George H. McLoughlin, to whom the property had already been once sold.

Even upon the assumption, therefore, that the levy under the Percy execution was a taking of the property by a third person within the meaning of the exception above stated, and that the proceeds arising from the sale under said execution constituted, by operation of law, an application of the property to plaintiff's use, the defendant did not prove mitigation beyond the sum of \$5. The wrong-doer, and not the wronged party, should suffer the direct consequences of the wrong. *Ward v. Benson* (31 *How.* 411), is authority upon this point. In that case the general term of the supreme court held that the rule of damages in such a case is the actual value of the property at the time of the taking, less the amount which it produced at the sale.

*Atwood v. Lynch* (37 *N. Y. Sup'r Ct.* 5), does not help the defendant. In that case the sheriff, while making an illegal levy under one execution, had in

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his hands another and valid one against the same property, which bound the property, and one of the questions litigated was whether the sheriff could sell without an actual levy under the valid execution. The complaint alleged nothing beyond a naked trespass on June 24, 1864, which was the day of the sale. As the evidence was clear that at that time the sheriff not only held the goods in question, but also an execution against the plaintiff, which bound the goods, and as there was no evidence showing the final application of the proceeds of the sale, it was held that the plaintiff could not maintain trespass pure and simple as of the day of sale, and that is the extent of the decision.

Nor can the defendant derive any benefit from that class of cases which hold that where an officer of the law, as, for instance, a collector of duties or of taxes, holding valid process, seizes the property against which it is directed, in an illegal manner, or, though the seizure be regular, makes an illegal sale, the measure of damages is the value of the goods less the amount of the duty, or the tax which he was entitled to collect. They are not in point here.

There are other questions in the case which, in order to facilitate the re-trial of the issues, might properly be discussed now, if the whole of the evidence adduced at the trial were before us. But as the case, as settled and printed, contains only so much of the evidence as bears upon the points already considered, we shall not allude to them.

Plaintiff's exceptions should be sustained, the verdict set aside, and a new trial ordered with costs to plaintiff to abide the event.

SEDGWICK, J., concurred.

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HENRY VOLKENING, PLAINTIFF AND APPELLANT, v. HENRY P. DE GRAAF, ET AL., DEFENDANTS AND RESPONDENTS.

ACCOUNT STATED.—DISMISSAL OF COMPLAINT.

To make an account stated there must be a mutual agreement, a meeting of minds between the parties to it, as to the allowance or disallowance of their respective claims, and there must be proof of assent to the account as rendered, and to the balance appearing to be due (*Stenton v. Jerome*, 54 N. Y. 480; *Lockwood v. Thorne*, 18 *Id.* 285).

*Held*, that in this case all the essential elements of an account stated seem to be wanting.

*Also held*, that plaintiff's rights, if any he had, were not enforceable in this form of action; and he, not having stated his true cause of action, and having failed to prove the one alleged, the complaint was properly dismissed. It was not a variance, but a failure of proof (*Code*, § 171; *Code of Civ. Pro.* § 541; *Bernard v. Seligman*, 54 N. Y. 661; *Barnes v. Quigley*, 59 *Id.* 265).

Before SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal from judgment dismissing plaintiff's complaint.

*Nelson Smith & Leavitt*, attorneys, and *Nelson Smith*, of counsel, for appellant.

*James R. Marvin*, attorney, and counsel, for respondents.

BY THE COURT.—FREEDMAN, J.—This action is brought upon an account alleged to have been stated between Derleth Brothers, plaintiff's assignors, and the defendants, on November 28, 1874.

Prior to that time, Derleth Brothers had had numer-

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ous dealings with the defendants. For years they had made for, and sold to the defendants, furniture, and office and store fixtures, and the course of dealing had been as follows:

When they delivered goods, they sent a bill, and when the correctness of the bill was ascertained, the defendant's bookkeeper entered the amount of it in a certain pass-book, kept between the parties, to the credit of Derleth Brothers. As payments were made to the latter, they were also entered in the said pass-book. From time to time, the account kept in this manner was balanced.

There was only one transaction out of the ordinary course of dealings, and that rested upon a separate and distinct agreement. It constituted a sort of joint adventure between Derleth Brothers and the defendants, to fit up a certain saloon for one John H. McKinley, who was to pay a certain proportion in cash, and the balance in notes, to be secured by a chattel mortgage. It was agreed between Derleth Brothers and the defendants, that the work should be proportioned between them, but that all bills should be rendered to McKinley in the name of the defendants, and that Derleth Brothers would take their proportion of the cash and of the notes, when received by defendants from McKinley, and moreover, to take the notes without recourse. Under this special agreement, Derleth Brothers furnished about \$3,000 worth of goods. By arrangement between the parties to this agreement, and as a matter of convenience, these goods were placed to the credit of Derleth Brothers in the said pass-book, but distinguished from the other goods by being marked "McKinley," and in the bills rendered by Derleth Brothers to the defendants, they were distinguished in like manner. But although thus kept distinguished, the amount of said goods was carried forward in the account as it ran along, and as

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from time to time it was balanced in the pass-book. It is the last balance thus appearing in the pass-book, that the plaintiff, as assignee of Derleth Brothers, seeks to recover in this action.

The evidence is undisputed that the amount thus sued for constitutes a balance due from McKinley on account of the goods furnished by Derleth Brothers. McKinley, after having made some payments in cash, of which Derleth Brothers received their share, refused to give notes pursuant to his contract. Indeed, he defrauded both the defendants and Derleth Brothers. All other claims which ever existed between the defendants and Derleth Brothers have been adjusted and settled up.

Upon this state of facts I fail to see how the plaintiff can maintain the action in the form in which he brought it. All the essential elements of an account stated seem to be wanting. To make an account stated there must be a mutual agreement, a meeting of minds between the parties to it, as to the allowance or disallowance of their respective claims, and there must be proof of assent to the account as rendered and to the balance appearing to be due (*Stenton v. Jerome*, 54 N. Y. 480; *Lockwood v. Thorne*, 18 *Id.* 285).

The defendants never agreed to pay Derleth Brothers cash for the McKinley goods, nor is there any proof that they ever in any way acknowledged a liability on their part to pay for them in some way as for goods sold and delivered to themselves. On the contrary, as to the goods in dispute Derleth Brothers were to run a certain risk. The balance shown by the pass-book, therefore, is not a balance for which the defendants are directly liable, and no such liability can be created in this case by a mere legal fiction.

Whatever, therefore, the precise rights of Derleth Brothers under the special contract may be, and it is not necessary to determine them here, they cannot be

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enforced in this form of action. If the defendants have been guilty of a breach of the special contract on their part, or of fraud, misconduct or negligence in the performance thereof, whereby the rights of Derleth Brothers were prejudiced, they may be held to answer in an action founded upon such breach or offense. But in any event the plaintiff is bound to allege his true cause of action. Not having done this, and having failed to prove the one alleged, the complaint was properly dismissed. It was not a variance, but a failure of proof (*Code*, § 171; *Code of Civ. Pro.* § 541; *Bernard v. Seligman*, 54 *N. Y.* 661; *Barnes v. Quigley*, 59 *Id.* 265).

The judgment should be affirmed with costs.

SEDGWICK, J., concurred.

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ALEXIS GODILLOT, PLAINTIFF AND RESPONDENT,  
v. EDWARD C. HAZARD, ET AL., DEFEND-  
ANTS AND APPELLANTS.

TRADE-MARKS.—INJUNCTION.

Every manufacturer and every person for whom goods are manufactured, has a right to distinguish the goods he manufactures, or sells, by a peculiar mark or device, that they may be known as his in the market, and he is entitled to protection of the same, irrespective of the fact that similar goods are manufactured or sold by others (See cases cited in opinion).

*Held also, by the court below*, that this right extends to a vendor who merely sells, and has no direct relation to the manufacturers.

A trade-mark may consist of anything not already appropriated; marks, forms, symbols, which designate the true origin or ownership of the article; this, although the words adopted are in common use. It cannot, however, consist of anything which merely



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denotes the name or quality. There can be no right to the use of mere generic words.

The language of Lord Justice GIFFORD, in *Lee v. Haley* (39 *Law Journal*, 380), approved: "The principle upon which the cases go is not that there is a property in the word, but that it is a *fraud* upon a person who has established a trade," &c., &c.

*Held*, in this case, that the injunction sought to be obtained in the action should be granted.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal by defendant from judgment enjoining him from using a certain trade-mark, &c.

The action was tried before the Hon. Claudius L. MONELL, at a special term, April, 1875.

The complaint alleged that the plaintiff, for more than three years, had been engaged in putting up in packages of about one pound each, and importing, an article known as "Julienne," compounded of various vegetables, for making Julienne soup, upon which package he had placed a label or trade-mark devised by him, a copy of which is annexed to the complaint.

The device consists of the words "Conserves Alimentaires," under which is the coat-of-arms of the city of Paris ; upon either side of the monogram a "C" in a circle, and underneath the words "Paris" and "Julienne," with directions for preparing for use and using.

The device adopted by the defendants is in all respects like the plaintiff's device, except the monogram is "F. G." In size, type, color, and appearance, the two devices are entirely alike.

The answer alleged that "Julienne" was a generic name, and the mixture of vegetables used in making Julienne soup was prepared and imported into the

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United States long prior to its being put up and imported by the plaintiff, and was previously well known to the general public by the name of "Julienne."

Upon the pleading and affidavits, a motion was made and granted to dissolve the preliminary injunction, but no appeal was taken.

On the trial the plaintiff testified that the article was put up for him in Paris, and that it has not before been prepared or put up in the same manner. There was evidence on the part of the defendants that the article known as "Julienne" was prepared and put up by several other manufacturers in France, and was imported into this country.

One of the defendants testified that the defendant caused the label they used to be printed in Paris by their agent, having previously seen the plaintiff's label on packages of the "Julienne" they had purchased from him.

The court found the fact that the plaintiff first adopted, and uses the label claimed as his trade-mark, that the defendants' label was calculated to deceive the customers of the plaintiff to his damage.

The following opinion was delivered at special term :

MONELL, Ch. J.—The case made by the evidence upon the trial of this action so far varies it from the case presented upon the motion to vacate the injunction, that I am not embarrassed by the decision then made.

It now appears that the article sold by the plaintiff was prepared and put up for him in Paris by the firm of Hollier & Co., and although there is evidence that a similar article, designated "Julienne," is prepared and put up at other establishments in France, yet it is clearly established that the "Julienne" imported and sold by the plaintiff is prepared and put up expressly for him.

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It is not, therefore, in my opinion, material whether other manufacturers prepare the same article in the same manner and of the same material, or that it is imported into the United States and sold by other persons.

There is no such property in the secret of manufacture that it can be protected; any one may prepare "Julienne" of the same ingredients that enters into the composition of the plaintiff's article, and he may designate it "Julienne," and sell it as such. The property and right to protection is in the device or symbol which is invented and adopted to designate the goods to be sold, and not in the article which is manufactured and sold.

The right to protection is not exclusively in the manufacture. The person for whom the goods are manufactured (*Amoskeag M'f'g Co. v. Spear*, 2 *Sandf.* 599; *Walton v. Crawley*, 3 *Blatchf.* 440) and the vendor who sells and who may have no direct relation to the manufacturer, has such right (*Partridge v. Menck*, 2 *Barb. Ch.* 103; *Taylor v. Carpenter*, 2 *Sandf. Ch.* 614).

Even, therefore, assuming that the article imported by the plaintiff is an article of common manufacture in France, and is imported generally into this country, and sold under the name of "Julienne," that does not deprive the plaintiff of his property in the device which he has invented as a trade-mark, and which he has put upon the packages, for the purpose of designating the article he sells.

In *Amoskeag Manufacturing Company v. Spear* (*supra*), the learned Justice DUER says (p. 605):—"Every manufacturer and every merchant for whom goods are manufactured has an unquestionable right to distinguish the goods he manufactures or sells by a peculiar mark or device, in order that they may be known as his in the market;" and in *Partridge v. Menck* (*supra*), the chancellor says (p. 103): "The

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question is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, nor whether the article made and sold by the defendant is of the same quality and value." And BEARDSLEY, J., says, in *Tyler v. Carpenter* (*supra*): "It is immaterial that the complainants were not admitted to be the manufacturers of the article. It was conceded that they were the *vendors*, and engaged in the sale of it." In *Lee v. Haley* (39 *Law Jour.* 284) the plaintiffs were dealers in coal—a natural product, in the general reach of all dealers. Yet the court protected the good-will of a business represented by a particular style of address.

It sufficiently appears from the evidence that the plaintiff is in a position to entitle him to adopt a trade-mark to designate the goods in question. They were manufactured exclusively for him, and, within the authorities I have cited, he, as the vendor, had a right to establish a reputation for the quality of the article he sold, and perpetuate it by a device which would denote its origin and ownership.

If he has done so, he should be protected in its exclusive use.

A trade-mark may consist of anything, marks, forms, symbols, which designate the true origin or ownership of the article. It cannot consist of anything which merely denotes the name or quality.

There can be no right to the use of mere generic words. Hence "Julienne," designating the manufactured article, does not denote origin or ownership, and like "Schnapps" (*Wolfe v. Goulard*, 18 *How. Pr.* 64) and "Club House Gin" (*Corwin v. Daly*, 7 *Bosw.* 222), it is a word used merely to designate the article or its quality.

The words "Conserves Alimentaire," which are alike applicable to every description of preserved or dessicated food, do not relate exclusively to the name or

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the quality of any particular preparation, and are, therefore, the subject of an exclusive appropriation in connection with words which did not denote the name or quality, and in that sense they may be regarded as designating the true origin or ownership of the manufacturers.

The adoption of words in common use as a trade-mark was sanctioned in *Matsell v. Flanagan* (2 *Abb. N. S.* 459), where the "United States Police Gazette" was held to be an infringement of the plaintiff's right to the use of the "National Police Gazette;" and in *Messerole v. Tynberg* (4 *Id.* 410), the word "Bismark," as a trade-mark for a particular description of paper collars, was protected; and in *Newman v. Alvord* (49 *Barb.* 588), a stronger case, "Akron Cement," which was the name of the *place* where the cement was made, was brought within the class of words entitled to be appropriated as a trade-mark. These several cases are approved in *Rillet v. Carlier* (11 *Abb. N. S.* 186), where the manufacture of a syrup from the juice of the pomegranate was called "Grenadine" and "Grenade Syrup." In that case it appeared that "Grenade" was a French word signifying pomegranate, and that "Grenade Syrup" was sold in France under that name. It was, however, held that the plaintiff, by the adoption of the words, has acquired a property in their use which the courts would protect.

Again, the copy of the coat-of-arms of the city of Paris, when in connection or combination with other marks, words or devices, not denoting name or quality, will cover a property in it which will prevent its use in the same connection or combination by another person.

In this case, however, none of the words or devices are isolated or disconnected with each other. They form in combination a whole, supplemented by the plaintiff's monogram, together, as is claimed, constitute his trade-mark.

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It is not necessary in this case to designate any particular words or symbols as constituting the plaintiff's trade-mark ; although I am of opinion that the words "Conserves Alimentaires" on the coat-of-arms of the city of Paris as a symbol, could, if it was necessary, be separately regarded as such ; but the combination of all the words and symbols, which the plaintiff has put upon his label, entitles him to be protected against the appropriation and use of such combination by the defendants.

It has now come to be well settled, that the adoption of any words or device not already in use, and not denoting the name or quality of the article, will constitute a trade-mark ; and they so far become property that the courts will protect the owner against any usurpation or interference ; and for the well-grounded reason that a person who, by his skill and industry, has acquired a good reputation for the commodity he manufactures or sells, ought to be allowed to reap the fruits of it. This is forcibly illustrated in *Williams v. Johnson* (2 *Bosw.* 1), when the trade-mark was "Genuine Yankee Soap," words of common use, but as they did not denote the name or quality of the manufacture, the plaintiff's property in them was fully sustained.

Independently of this, the label, as a whole, is entitled to protection. The courts have gone to the extent of bringing within its protection not the trade-mark alone, but the packages, cases, and handbills (*Williams v. Spence*, 25 *How. Pr.* 366). In *Cook v. Starkweather* (13 *Abb. N. S.* 392), the court held, that the package, case, or vessel, in which the commodity is put, is prepared in a peculiar or novel manner, constituted it so much a part of the trade-mark as to entitle it to participate in the protection which would be given to the trade-mark itself.

Upon the whole case, therefore, I am satisfied that

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the plaintiff has such property in the label he has adopted to designate the goods he offers for sale, that he should be protected in its exclusive use. He has, through his skill and industry, gained a reputation in the community for the excellence of the article he imports, and he ought to be permitted to reap the profits of it.

I am led to my conclusion in this case the more readily for the reason that I can find no excuse or justification for the defendants' acts. One of them testified that they had frequently purchased packages of the plaintiff's "Julienne," and had sent to Paris directions to have their label prepared. It was prepared in all respects like the plaintiff's, except the insignificant change in the monogram.

That it was a willful invasion of the plaintiff's rights there can be no possible doubt. The defendants were at liberty to manufacture "Julienne," or have it manufactured for them, of the same materials and in the same manner, and to import and sell it in this market under the same name, and the plaintiff would have had no legal cause of complaint. With that undisputed right they were not content, but they meant to also trade upon the plaintiff's reputation, and profit by it.

In *Lee v. Haley (ubi supra)*, Lord Justice GIFFORD says: "The principle upon which the cases go is not that there is property in the word, but that it is a *fraud* upon a person who has established a trade, and carries it on under a given name, that some other person should assume the same name." And the Chancellor in *Partridge v. Monck (ubi supra)*, also says: "That, having appropriated to himself a particular label or sign or trade-mark, indicating to those who wish to give him their patronage, that the article is manufactured or sold by him or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any person who at-

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Respondent's points.

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tempts to pirate upon the good-will of the complainant's friends or customers, or of the patrons of his trade or business, by sailing under his flag without his authority or consent."

And, again, in *Rillet v. Carlier* (*ubi supra*), Mr. Justice PRATT says: "The defendants can have no possible motive in using these words (Grenade Syrup), except to avail themselves of the reputation the plaintiff's article has gained under this name."

The plaintiff must have judgment perpetually, enjoining the defendants from using the trade-mark, with costs.

*Hugh Porter*, attorney, and of counsel, for appellant,—Cited: *Newman v. Alvord*, 51 *N. Y.* 189; *Amoskeag Manufacturing Co. v. Spear*, 2 *Sandf.* 599; *Partridge v. Menck*, 2 *Barb. Ch.* 101; *Lemion v. Ganton*, 2 *E. D. Smith*, 343; *Wolfe v. Barnett*, 24 *La. An.* 97; *Del. and Hudson Canal Co. v. Wallace*, 13 *Wall.* 311 (*U. S. Supreme Court*, 1871); *Ferguson v. Davol Mills*, 2 *Brew.* 314, and *Cox Am. Trademark Cases*, 516; *Caninchal v. Latimer*, 5 *N. Y. Weekly Dig.* 46; *Osgood v. Allen*, 1 *Holmes*, 185; *Congress and Empire Spring Co. v. High Rock Congress Spring Co.*, 45 *N. Y.* 291; *Dixon Crucible Co. v. Guggenheim*, 2 *Brews.* 321; *Upton Trademarks*, 25-30; *Leather Cloth Co. v. Am. Leather Cloth Co.*, 11 *H. Ld. Cas.* 523; *Piddin v. Howe*, 8 *Sim.* 477; *Partridge v. Menck*, 1 *How. App. Cas.* 547; *Wolfe v. Burke*, 56 *N. Y.* 115; *Palmer v. Harris*, 60 *Penn.* 156; *Hobbs v. Francis*, 19 *How. Pr.* 567; *Fetridge v. Wells*, 4 *Abb. Pr.* 144.

*Nelson Smith & Leavitt*, attorneys, and *Nelson Smith*, of counsel, for respondent,—Cited: *Amoskeag Manufacturing Co. v. Spear*, 2 *Sandf.* 599; *Walton v. Crawley*, 3 *Blatchf.* 440; *Taylor v. Carpenter*, 2 *Sandf. Ch.* 603, 614; *Same v. Same*, 11 *Paige*, 292; *Wother-*



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spoon v. Currie, *L. R.* 5 *H. L.* 508; Partridge v. Mauk, *Cox Am. Trademark Cas.* 72 [This reporter gives the case as decided by V.-Ch. SANFORD, Ch. WALWORTH, and the court of appeals]; Morrison v. Case, 9 *Blatchf.* 548; Coleman v. Crump, 70 *N. Y.* 573; Brie v. Larband, decided in the French court of Riom, and reported in *Brown on Trademarks*; Raggatt v. Findlater, *L. R.* 17 *Eq. Cas.* 36; McAndrew v. Boss, 4 *De Gex, J. & S.* 380; Ford v. Forrester, *L. R.* 7 *Ch. App.* 70; Broadhurst v. Barlow, decided by Vice-Chancellor WICKENS, in 1872, 11 *Alb. L. J.*, 169, where the case is reviewed; Knott v. Morgan, 2 *Keen*, 213; Seixo v. Provezende, *L. R.* 1 *Ch. App.* 198; Croft v. Day, 7 *Beavan*, 85; Edelsten v. Edelsten, 1 *De Gex, J. & S.* 185; Hirst v. Denham, *L. R.* 14 *Eq.* 542; Braham v. Bustard, 1 *Hemming & M.* 447.

The decision of the general term was as follows:

PER CURIAM.—The judgment appealed from should be affirmed with costs upon the opinion delivered at special term.

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ABRAM DU BOIS, PLAINTIFF AND RESPONDENT, v.  
ALFRED B. DARLING AND CHARLES W.  
GRISWOLD, DEFENDANTS AND APPELLANTS.

#### I. EASEMENTS.

1. Covenant against erecting a building within a certain distance of the front line of premises, and erecting certain specified buildings, among them a livery stable or private stable.

##### (a) BREACH OF, WHAT IS.

1. The erection, on the greater part of the reserved space, of a porch 16 feet 8 inches wide, extending to the front line

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of the premises, with bay-windows on each side, having their foundations on the ground, and rising therefrom five stories high, and approaching within a few inches to the said front, the same constituting a part of a large building erected, as to this part on the reserved space, and as to the residue on land in the rear, is such breach.

(b) ABANDONMENT, OR WAIVER, OF COVENANT, OR ESTOPPEL AGAINST ENFORCING.

1. WHAT WILL NOT AMOUNT TO.

(a) *Private Stable.* The bare fact that the common grantor (one of the parties to the original agreement) of the plaintiff and defendant, maintained a private stable on the lot subsequently conveyed to defendant, on which he erected the porch and bay-windows above referred to, and which adjoined the lots previously conveyed to plaintiff, and that the stable remained thereon until removed by defendant, without any interference by plaintiff, will not.

(b) *Bay-window on another lot.* The mere standing by and seeing an owner of another lot, subject to the same easement, build, without objection, a bay-window overhanging the restricted space, will not.

(c) *Iron balcony built by plaintiff.* The fact that the plaintiff himself attached an iron balcony to the front of his house, projecting 3 feet 4 inches over the reserved space, said attachment not being intended as an evasion of the covenant, or made otherwise than with a belief of a right to do so, will not.

2. WHAT WILL AMOUNT TO.

Acts of plaintiff which are of a character to lead, and have led others to treat the servient estate as if free from the servitude, will, as to those who have acted on the faith thereby induced, that the servitude was abandoned.

II. INJUNCTION.

1. MANDATORY.

(a) RESTORATION OF THINGS to their former condition may be effected thereby.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided March 8, 1879.*

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Statement of the Case.

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This action was brought to enforce a covenant between two owners of different adjoining pieces of land, situated on the south side of Thirtieth street, between Broadway and Fifth avenue, in the city of New York. The complaint asks, that the defendants be required and commanded to take down and remove a certain porch and bay-windows, or such portions of their building, as project beyond a line drawn parallel with the southerly side of Thirtieth street, distant six feet southerly therefrom ; and also that the defendants be perpetually enjoined and restrained, from erecting any part of the said building upon, or which shall overreach or overhang, any part of the defendants' lands, which lie north of said line.

Both pieces of land were originally owned by Ann Greer, who, with her husband, in 1868, conveyed to the plaintiff his parcel. The defendants' parcel was first conveyed by said Ann Greer (widow), to Charles L. Anthony, in 1872, and by his executors to the defendants, in 1875. Before the above conveyances were executed, one James W. Anderson was the owner of certain other lands, adjacent to plaintiff's, on the south side of Thirtieth street, between Broadway and Fifth avenue. Ann Greer and James W. Anderson, as such owners, on the first day of May, 1868, entered into an agreement with mutual covenants in writing, whereby among other things, it was mutually covenanted and agreed, "that they will not at any time hereafter erect any building upon said lands, within six feet of the south side of Thirtieth street," and further, "that the covenants and restrictions herein contained, and the right to enforce the same, are attached to and run with the land hereinbefore described, and that any of the parties hereto, and also persons claiming any estate or interest in the said lands under them, or any or either of them, shall have the right to restrain any person or persons vio-

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Statement of the Case.

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lating this agreement by any proper proceedings or action at law, or in equity, and to recover damages for the violation of the same." All the deeds were duly recorded and were made subject to and contained the covenants and restrictions contained in the original agreement entered into between Ann Greer and her husband and James W. Anderson.

In 1868 the plaintiff erected a dwelling-house on his premises, at an expense of about \$50,000, and built the front wall upon a line six feet south of the southerly line of Thirtieth street, according to the restrictions in the agreement.

In May, 1877, the defendants began to erect a large flat or apartment house on their three most westerly lots and next adjoining the plaintiff's premises on the east, about seventy-five feet front, and extending to the rear of the lots, and five stories high.

The front wall of the building is placed on the same line as the plaintiff's house. The front windows of the east and west wings of the house consist of bay-windows, and by the plans were to be carried from the foundations to the top of the house. The foundations rested upon the ground, and projected beyond the front line of plaintiff's building, five feet four inches.

A perch was erected in the front of the building between the bay-windows, extending six feet beyond the main line of the building and beyond the main line of the plaintiff's house. These projections cover about thirty-five or forty feet of the entire front reserved by covenant in front of the building.

At the time of the commencement of this suit, the bay-windows were carried nearly up to the top of the first story above the basement, but have not been carried higher since the suit was brought.

There was a judgment at special term, requiring the defendants to remove such portions of the porch and bay-windows as are built beyond the line six feet south

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Respondent's points.

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of Thirtieth street, and restraining them from erecting any building upon the strip of land between this line and the street. From this judgment the defendants appealed to the general term.

*Horace Barnard*, attorney, and of counsel, for appellants,—As to the maintenance of the stable extinguishing the whole easement, cited: *Washb. on Easements*, 58, 59, 632, 657, 658; *Washb. on R. P.* 84; *Aet. Dock Co. v. Leavitt*, 54 *N. Y.* 35; *Corning v. Gould*, 16 *Wend.* 531, 538; *White's Bank v. Nichols*, 64 *N. Y.* 74. As to plaintiff's balcony extinguishing the easement,—cited: *Lattimer v. Livermore*, *N. Y. Weekly Dig.* May to June, 1878; *Corning v. Troy Nail & Iron Factory*, 40 *N. Y.* 203; *Roper v. Williams*, *Turner & R.* 22. As to estoppel by acquiescence,—cited: *Washb. on Easements*, 661; *Roper v. Williams*, *supra*; *Arnold v. Common*, 50 *Penn.* 361; *Corning v. Troy Nail & Iron Company*, 40 *N. Y.* 203.

*Hutchins & Platt*, attorneys, and *Waldo Hutchins*, of counsel, for respondent, urged:—I. The owners of land may, by mutual covenants, regulate the use of their respective properties, which covenants may run with the land, and bind all subsequent purchasers; and any consideration, however slight, will support this covenant in law and equity.

II. There is no rule which prevents the court from granting a mandatory injunction where the injury sought to be restrained has been completed before the filing of the bill. A mandatory order is nothing more than a decree of specific performance, which is every day's practice in a court of equity, and which is seldom denied unless the remedy at law is perfectly adequate (*Kerr on Injunctions*, marginal paging, 231–233, and cases cited).

III. There is a distinction between cases depend-

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Opinion of the Court, by CURTIS, Ch. J.

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ing on nuisance and those depending on contract. "Where there is a contract, the court cannot attach the same importance to the question, whether the damage is serious or not, as it does in mere cases of nuisance, but the main point is, whether the contract has been broken" (*Attorney-General v. Mid Kent Railway Company*, *L. R. 3 Ch. App.* 100-104).

IV. Though a court of equity has no jurisdiction to compel the performance of a positive act tending to alter the existing state of things, such as the removal of a work already executed, it may, by framing the order in an indirect form, compel a defendant to restore things to their former condition, and so effectuate the same results as would be obtained by ordering a positive act to be done. The order when framed in such a form is called a mandatory injunction. If the act complained of is a breach of an express stipulation, the injunction will issue, notwithstanding the amount of inconvenience to the other party (*Kerr on Inj.* marginal, 231; *Isenburg v. East India House, &c., Company*, 33 *L. J. Ch.* 392; *Durell v. Pritchard*, 1 *L. R. Ch. App.* 244; *Low v. Inness*, 10 *Jur. N. S.* 1037; *Martin v. Headon*, 2 *L. R. Eq.* 425).

V. This order has been granted and the principle recognized in the courts of our State, in Massachusetts, as also in other States (*Corning v. Troy, &c., Factory*, 40 *N. Y.* 191; *Linzee v. Mixter*, 101 *Mass.* 512; *Rogers' Locomotive Works v. Erie R. R. Company*, 5 *C. E. Green*, 379).

BY THE COURT.—CURTIS, Ch. J.—The defendants were obligated by the covenant in their deed, not to erect any building upon the lots conveyed to them, within six feet of the south side of Thirtieth street. In violation of this obligation they commenced the erection of a structure five stories in height, with bay-windows and a porch rising from their foundation on

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Opinion of the Court, by CURTIS, Ch. J.

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the ground the entire height of the edifice, occupying the greater part of the land reserved on the south side of Thirtieth street. The porch was sixteen feet and eight inches in width, extending to the line of Thirtieth street, and the bay-windows approaching it within a few inches.

The plaintiff owning the adjoining house, west of this building, subject to the same restriction, and built in accordance with it, seeks by injunction to prevent this infringement upon the enjoyment of his premises. It is evident that his complaint, that the light, air, and view which he had been accustomed to enjoy on his own premises would be materially diminished by defendant's building, is well founded.

No question is raised as to the right of the original grantors of the lots to make the covenant in question, for their mutual benefit and that of their grantees.

The defendants insist that there has been an abandonment by the plaintiff of the restriction. That the Greers, parties to the original agreement, made May 25, 1868, containing this restriction, and at that time the owners of both the plaintiff's lot and the defendants' adjoining four lots, maintained or permitted a private stable on the lots afterwards conveyed to the defendants, and that the plaintiff assented thereto, and allowed it to remain for nine years, until removed by the defendants. The evidence fails to show that this stable was one of the class prohibited by the restriction, and even if it had been, there is no evidence of any assent or allowance by the plaintiff that it should remain there. The vested rights of the plaintiff, under this agreement, would not be impaired by reason of the Greers violating one of its provisions, even if they had done so.

The defendants claim that the plaintiff when built his own house, No. 16 West Thirtieth street, allowed Dr. Bumstead to build a bay-window at No. 22 West

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Thirtieth street, overhanging a portion of the restricted six feet, which operated as an abandonment of the agreement. The evidence fails to show any permission or license from the plaintiff to Dr. Bumstead of this nature. The plaintiff testified that he did not make any objection to it. He may have regarded it as not conflicting with the agreement, or as of no importance. Even if this act of Dr. Bumstead had been a violation of the agreement, the plaintiff, by no act or acquiescence in respect to it, has been shown to have abandoned the restriction.

The claim of the defendants, that the plaintiff saw that they were building in this way, upon the reserved portion of their lots, and *suffered* them to proceed, and is thereby estopped by his own acts and laches, is not sustained by the evidence, but on the contrary, he appears to have notified the agents of the defendants of his rights, and to have proceeded with all reasonable diligence under the circumstances to enforce them.

The defendants, as a further ground, state the plaintiff has himself built a balcony on the front of his house, overhanging the reserved premises, and does not come into court with clean hands. The proofs show that he has an iron balcony attached to the front of his house, and projecting three feet and four inches over the reservation. There is nothing to show that this construction was an evasion of the covenant, or that it was placed there otherwise than with the belief that he had a right to do so. It has been held that where, under similar circumstances, a balcony was erected, not intended as a mere evasion of the covenant, projecting from the front wall of a house, it was not a violation of a covenant of the same description (*Perkins v. Coddington*, 4 *Robt.* 647). The plaintiff is shown to have purchased a lot and built a very valuable house, relying upon this agreement as contributing to his enjoyment of it. He paid an enhanced price as



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Statement of the Case.

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a consideration for the land in consequence. He comes into a court of equity seeking to be protected in such enjoyment. No bad faith is shown on his part, and no intent to evade or abandon the restriction. He has not placed himself by his own acts without the pale of equity, and in view of what the courts have held, is entitled to relief.

The evidence fails to establish that the defendants acted upon belief that the plaintiff intended to abandon his right to the enjoyment of the reservation (*Bank of Buffalo v. Nichols*, 64 *N. Y.* 74; *Tallmadge v. E. R. Bank*, 26 *Id.* 105; *Trustees v. Lynch*, 70 *Id.* 449).

The judgment appealed from should be affirmed, with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

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PHILIP HERRMAN, PLAINTIFF AND RESPONDENT,  
v. THE MERCHANTS' INSURANCE COM-  
PANY, DEFENDANT AND APPELLANT.

I. *Insurance—Fire.*

1. CONDITION OF POLICY, THAT IT SHALL BE VOID IF THE PREMISES BECOME VACANT AND UNOCCUPIED.

(a) BREACH, WHAT IS NECESSARY TO CONSTITUTE.

1. Vacancy and absence of occupancy, as two separate facts, must occur jointly.

(b) VACANCY.—DEFINITION OF.

1. *Empty—void of every substance except air.*

a. *Ergo*—A dwelling-house in charge of servants, with all its furniture, cooking-utensils, beds, mattresses and summer clothing of the owner and his family, is not vacant, although neither the owner nor any member of his family is in personal occupation.

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Statement of the Case.

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## (c) UNOCCUPIED.—DEFINITION OF.

1. When no one has the actual use or possession.

## II. SYNONYMS.

“Vacant” and “unoccupied” *are not*.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided March 8, 1879.*

Appeal by defendants from the order denying their motion for a new trial, and also from the judgment entered against them upon the verdict directed by the court at the trial.

The action is to recover upon a policy made by defendants June 3, 1874, and insuring for three years plaintiff's house and furniture, &c., at Lloyd, Ulster county, New York. The house was for years the summer residence of the plaintiff and his family, from about the middle of May to the middle of November. November 20, 1876, the plaintiff and his family came to this city, leaving the dwelling-house and other property mentioned in the policy, in charge of his farmer, who, with his family, resided in the frame dwelling mentioned in the policy, and who were permitted to live in the main dwelling-house if they had not sufficient room in their own. The plaintiff left in the house all his furniture, cooking-utensils, piano, beds, mattresses, and the summer clothing of himself and family.

The premises remained in the charge of the farmer and his family until the fire. They regularly went into the dwelling-house, opened, went through, aired and secured it. It was in sight from their own dwelling. They used, watched and guarded it and the other buildings and property.

After plaintiff moved to the city, he and his wife

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Appellant's points.

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visited the dwelling-house in question every two weeks, remained in it during the day, examined the property, and lunched there ; and were last there three days before the fire, with painters, going through the house with, and directing them as to painting.

Plaintiff intended to return with his family to the premises in question as their summer residence.

Upon the trial, the defendant waived the defense of plaintiff's refusal to arbitrate, and made no question as to the amount of the loss, or the service, or sufficiency, of the proofs of loss.

A fire occurred April 8, 1877, destroying portions of the insured property, and caused a loss to the plaintiff of over \$12,000.

*George N. Parsons*, attorney, and of counsel, for appellant.—I. The motion to dismiss the complaint should have been granted, as the undisputed evidence showed that the premises, for the loss of which the action seeks recovery, had become vacant and unoccupied long before, and so remained at the time of, the fire. As to occupancy : *Whitney v. Black River Ins. Co.*, 9 *Hun*, 41 ; *Paine v. Agricultural Ins. Co.*, 5 *Thomp. & Cooke*, 619 ; *Wustum v. City Fire Ins. Co.*, 15 *Wis.* 138 ; *Harrison v. City Ins. Co.*, 9 *Allen (Mass.)* 231 ; *Keith v. Quincy Mu. Ins. Co.*, 10 *Allen*, 228 ; *Wood on Ins.* § 89, p. 180 ; *Franklin Savings Ins. Co., v. Central Ins. Co.*, 119 *Miss.* 240 ; *Ashworth v. Builders' Ins. Co.*, 112 *Mass.* 423 ; *Ætna Ins. Co. v. Burns*, 5 *Ins. Law Journal*, 69. As to vacancy : *In American Ins. Co. v. Padfield*, 78 *Ill.* 167, the policy contained the provision that "If the house should become vacant and unoccupied, policy should be void." The tenant had left, but some furniture remained. The court *held*, that a fair and reasonable construction of the language, vacant and unoccupied, was, that the house should not be without an occupant—without

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any one living in it. That the words were not used in a technical but in a popular sense; and in conclusion *held*, that the house became vacant and unoccupied within the meaning of the policy (North Am. Ins. Co. v. Zaenger, 63 Ill. 464). In Sleeper v. New Hampshire Fire Ins. Co., 56 N. H. 401, the policy provided that it should be void if the premises should become vacant by the removal of the owner or occupant without immediate notice. The occupant removed to another town with his family and part of his furniture, without notice to the owner or the company, intending to return in eight months, or earlier, if business warranted. Fire occurred in four months. *Held*, that the premises were vacated within the meaning of the policy and policy void—and overrules the case in 55 N. H. 249. To same effect is Thayer v. Agricultural Ins. Co., 5 Hun, 566.

II. It was argued by plaintiff's counsel on the trial that inasmuch as defendant insured a dwelling for plaintiff in the city as well as this dwelling in the country, defendant's officers must have known that plaintiff occupied one place in winter and the other in the summer, and alternately left each unoccupied during his occupancy of the other, and hence defendant was estopped from invoking this clause in defense of this action. As to this: The agreement in the policy has repeatedly and uniformly been held to be a promissory warranty, which must be strictly kept; and not like a condition of insurance, the observance or performance of which might be waived by knowledge and acquiescence (*Wood on Ins.* § 165, 317, and cases cited; see also *Id.* 341, where warranty is concisely stated; *Mead v. North Western Ins. Co.*, 3 Seld. 530; see also *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, 587; *Wood on Ins.* 330, and cases cited; *Lee v. Howard Ins. Co.*, 3 Gray, 588; *Murdock v. Chenango Co. Ins. Co.*, 2 Comst.

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210; *Wood v. Hartford Fire Ins. Co.*, 13 *Conn.* 533; *Chase v. Hamilton Ins. Co.*, 20 *N. Y.* 52; *Gilbert v. Phoenix Ins. Co.*, 36 *Id.* 372; *Alexander v. Germania Ins. Co.*, 66 *Id.* 464; 3 *Allen*, 569; 8 *Cushing*, 127; 10 *Barb.* 285; 7 *N. Y.* 370; *Blumer v. Phenix Ins. Co.*, 7 *Ins. Law Journal*, 833, July, 1878; *Poor v. Humboldt Ins. Co.*, *Id.* 874, March, 1878; *Ætna Ins. Co. v. Burnes*, 5 *Id.* 69, *supra*). The cases that plaintiff relied upon to the effect that knowledge on the part of the underwriter of the breach of a warranty operates to relieve from the breach, will be found to be based upon the principle of estoppel; and to decide simply that where the underwriter, with a knowledge of the breach, does some act recognizing and affirming the validity of the policy, he shall not be heard to question it afterwards.

III. Another suggestion made in behalf of plaintiff on the trial was that all of the buildings on the farm were comprised in the word "premises" used in the policy; and that as all of them were not vacant and unoccupied, the warranty was not broken. 1. A reference to the policy will exhibit the fallacy of the proposition. The different buildings and properties were separately insured, as much so as if separate policies had been issued upon each risk. In *Associated Firemen's Ins. Co. v. Assum*, 5 *Md.* 165, the policy was for \$1,000—say \$700 on books and \$300 on music, &c.; and the policy contained a clause that if the assured should thereafter make other insurance on the assured premises, the policy should be void, unless notice was given. *Held*, that the proper construction of the policy was that if any part of the goods embraced in the policy were afterwards insured in another office without notice, the policy became void. To the same effect is *Smith v. Empire Ins. Co.*, 25 *Barb.* 497; *Whitwell v. Putnam Fire Ins. Co.*, 6 *Lans.* 166; also *Ill. Mu. Ins. Co. v. Fix*, 53 *Ill.* 151.

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Appellant's points.

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IV. Finally it was claimed on the trial that because the words "vacant and unoccupied" were connected by a copulative conjunction, they must have a different signification; but counsel failed to show which word had a more extended or different meaning than the other, or which word saved plaintiff from the application of the evidence in this case. 1. But contracts as well as pleadings often contain synonymous terms connected indiscriminately; as in this instance, by copulative or disjunctive conjunctions, without in any sense changing the signification (*Hill v. Equitable Mu. Fire Ins. Co.*, 6 *Ins. L. J.* 314). (a) Thus we say without "let or hindrance," when the meaning of the words used in that connection are the same. In the last and best dictionary of English synonyms, by Richard Soule, one of the synonyms of "let" is "hindrance." (b) An instrument of assignment says, "assign and transfer, and make over," when the words are clearly synonymous (See same author, which gives as one of the synonyms of "assign" the word "transfer;" another is "make over;" so one synonym of "transfer" is to "make over," &c.). (c) So in the old action of trespass *quare clausum fregit*, defendant pleads that a fence was in great decay for want of "needful and necessary" repairs, &c., when one synonym of "needful" is "necessary," and one synonym of "necessary" is "needful." 2. But a complete answer to the point is that the same author treats the very words in question as synonyms. The word "vacant" has for its synonym the word "unoccupied." And Burrill in his law dictionary gives the legal meaning of the word "vacant" as "unfilled, unoccupied, without a claimant, tenant or occupier." This ought to dispose of the suggestion. 3. The only case cited in support of the proposition of plaintiff was an unreported one from the general term of supreme court in this district, viz.: *Woodruff v. Imperial Ins. Co.*, which does

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not pass upon the question, but merely says that as plaintiff was surprised by an inadvertent answer of a witness about the house being unoccupied, the court below properly exercised its discretion in setting aside a nonsuit, and allowing the whole evidence on that subject to come in; and the question whether there was a distinction to be made between that case, where the words "vacant and unoccupied" were used, and the cases cited on that argument in which the word "unoccupied" only was used, was not passed on. 4. But it will be noticed that neither of the cases in which that question was presented, viz.: *Whitney v. Black River Ins. Co.*, *American Ins. Co. v. Padfield*, *North American Ins. Co. v. Zaenger*, *Wood on Insurance, supra*, were cited to that court; so that it appeared to the court, as intimated in the opinion, that that was a question which had not been passed upon judicially.

*N. B. Hoxie*, attorney, and of counsel, for respondent, argued:—The policy is to be construed in the light of the knowledge by the defendant of the character and use of the premises. It is legally chargeable with such knowledge, and if so it is estopped to claim that the clause in question is applicable to such a cessation or suspension of occupancy as occurred here, for such was clearly contemplated (*Whitney v. Black River Ins. Co.* 9 *Hun*, 37 [aff'd in Ct. of Appeals, Feb. 14, 1878]; *Cone v. Niagara Ins. Co.*, 60 *N. Y.* 619; *Pitney v. Glens Falls Ins. Co.*, 65 *Id.* 6). The premises were not vacant and unoccupied, because they were in the charge of and occupied by the farmer and his family from the time plaintiff and his family left until the fire—the dwelling-house in question as much so as the farmer's own dwelling, the barns, &c., &c. In this case the premises or the dwelling-house alone

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would be considered as vacant and unoccupied only if the same were abandoned as a residence or a dwelling-house, and left without any human being to use, watch and care for it, and preserve it in condition fit and necessary for use as a dwelling. A dwelling-house is not vacant and unoccupied within the meaning of this policy, where, as in this case, the household furniture, wearing apparel, &c., remain in it, the house and furniture in charge of, and receiving the constant visits, care and scrutiny of members of the establishment (the farmer and his family), periodical visits and occupation by the owner and his wife, although the family of the owner are absent, but with intention to return and resume continuous dwelling therein, be the period of such contemplated absence long or short (Whitney v. Black River Ins. Co., *supra*; O'Brien v. Comm. Ins. Co., 6 J. & S. 517; Cummins v. Agricult. Ins. Co., 67 N. Y. 260; Shearman v. Niagara Ins. Co., 46 Id. 526; Gibbs v. Continental Ins. Co., 13 Hun, 611, 620). The use of the copulative conjunction in the clause in question "vacant and unoccupied," contemplates an abandonment of the premises; certainly something more than a temporary cessation of eating and sleeping, i. e., dwelling in the house. If the dwelling house was "unoccupied" it was not "vacant." The household furniture, wearing apparel, &c., all remained, and under the constant supervision of the farmer and his family. In the case of Woodruff v. Imperial Ins. Co., Supreme Court, General Term, First Department, May, 1877 (not reported), this precise question was considered, and determined in accordance with above views. The object of the use of the word "vacant" seems to have been to prevent the mere fact that the premises might become unoccupied, from itself rendering the policy void. For that purpose they were required to be vacant as well as unoccupied, and that sufficiently distinguishes this from



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the cases cited on behalf of the defendants to prevent them from controlling its present disposition. They were decided upon the effect required to be given to the clause relating alone to the fact of occupation (*Keith v. Quincy Mut. Ins. Co.*, 10 *Allen*, 228; *Wnstrum v. City Fire Ins. Co.*, 15 *Wis.* 138; *Ashworth v. Builders' Ins. Co.*, 112 *Mass.* 422, 424; *Paine v. Agricult. Ins. Co.*, 5 *N. Y. S. C. [T. & C.]*, 619), and in no way considered the effect that should be given to the phrase made use of in the policy issued to the plaintiff.

BY THE COURT.—CURTIS, Ch. J.—The principal question discussed and presented at the argument was whether the policy was annulled by a violation of the condition contained in these words “if the premises shall become vacant and unoccupied, except as herein specially provided for, or hereafter agreed to by this corporation in writing upon this policy, from thenceforth this policy shall be void, and of no force or effect.”

It is apparent that for the breach of this provision of the policy two separate facts, vacancy and absence of occupancy of the premises insured, must occur, and that, too, jointly, so as to be in existence at the same time. This is what the language of the policy calls for. It is urged by the defendants that these words were not used in the policy in a technical but a popular sense. Happily for the protection of real estate, the words expressing the relations and rights of individuals and the public towards it have existed from a very remote period, and during that interval been interpreted by the courts as always possessing the same meaning. Very little has been conceded to what may be their use in a popular sense, but it has been deemed that private rights and property were best protected by construing them strictly.

The word vacant is not the synonym of “un-

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Opinion of the Court, by CURTIS, Ch. J.

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occupied." Vacant means primarily, empty, void of every substance except air (*Webster's Dictionary*), and unoccupied is that status where no one has the actual use or possession of the thing or property in question. This distinction originates and exists in the language from which the terms descend to us (*Redfield v. Utica, &c. R. R. Co.*, 25 *Barb.* 58; *People v. Ambrecht*, 11 *Abb. Pr.* 101; *National Fire Ins. Co. v. McKay*, 5 *Abb. Pr. N. S.* 449).

Although there may be sound reasons for holding that the plaintiff, in the legal sense, and according to which the agreement should be construed, had not ceased to occupy the dwelling-house, yet it is not necessary to rest the decision on this view of it. The language of the policy calls for the dwelling being left both vacant and unoccupied before the policy will thereby become void. It cannot be, that either in the legal construction or popular sense claimed as the proper definition of the term "vacant," that this dwelling-house, in charge of plaintiff's servants, with all its furniture, cooking utensils, piano, beds, mattresses, and summer clothing belonging to the plaintiff and his family remaining there, was left vacant or empty (*Woodruff v. Imperial Ins. Co.*, First Department, General Term, not reported; *Cummins v. Agricultural Ins. Co.*, 67 *N. Y.* 263; *O'Brien v. Commercial Fire Ins. Co.*, 6 *J. & S.* 517; reversed, but not on this point, 63 *N. Y.* 108).

The court properly excluded the evidence offered, to show that the defendant's risk was increased, by the alleged vacancy and non-occupancy of the premises, as such vacancy and unoccupancy of the premises did not exist.

The judgment and order appealed from should be affirmed with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

Statement of the Case.

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LORENZ BOMMER, PLAINTIFF AND RESPONDENT,  
v. THE AMERICAN SPIRAL SPRING BUTT  
HINGE MANUFACTURING COMPANY, DE-  
FENDANT AND APPELLANT.

I. ESTOPPEL.

1. BY ACCEPTANCE AND USER.

(a) When one assigned to a corporation, either duly organized or held out so to be, an improvement made by him, and his right to letters patent therefor, the consideration expressed in the assignment being \$1, but the true consideration being, by an oral agreement, a certain royalty during the existence of the patent, and afterwards, but before the issuing of the patent, the corporation, if not before duly organized organized, or if before organized reorganized, under the said name used in the assignment, and the assignor, without any notice of the change, procured the issue of a patent in the corporate name used in the assignment, *and the company accepted the patent, entered into enjoyment thereof, and for a time paid to the assignor the royalty claimed by him, without any notice to him of any defect in its corporate existence, at a period previous thereto, the company*

IS ESTOPPED

from avoiding the obligation to pay the royalty originally agreed on.

II. STATUTE OF LIMITATIONS.

a. ROYALTY.

(a) In an action by an assignor *for an accounting, as to articles manufactured under a patent, assigned by an instrument under seal in consideration of a certain royalty on each article so manufactured, and for payment of the amount of royalty found due, the accounting is not to be limited to a period of six years before the commencement of the action.*

Before CURTIS, Ch. J., and FREEDMAN, J.

*Decided March 8, 1879.*

Appeal by defendant from a judgment entered

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Statement of the Case.

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upon a decision of a judge after trial at special term, and after the coming in of the report of a referee, appointed to take and state an account.

The action is to recover from the defendant a royalty of one cent for each pair of hinges manufactured by the defendant, under a patent for plaintiff's invention of an improved spring hinge made in 1862.

The defendant in its answer pleads the statute of limitations, and states that it is a corporation organized August 26, 1863, and that it was not in existence January 17, 1863, the date of the assignment of the invention and of the letters patent applied for, then executed by the plaintiff, but it admits that December 8, 1863, letters patent issued to it, and that it has ever since continued the manufacture of the invention.

At the special term, the findings of law and fact were as follows :

As matters of fact :—I. That Lorenz Bommer, the plaintiff, was on January 17, 1863, the inventor and owner of a certain spring butt spiral hinge, as described in the specifications and drawings attached to letters patent No. 40,879, dated December 8, 1863, and issued by the United States of America to the defendant herein.

II. That on January 17, 1863, plaintiff sold and assigned to the American Spiral Spring Butt Hinge Manufacturing Company, by an instrument under seal, all of his right, title and interest in said invention and letters patent to be issued thereon by the United States, for the nominal consideration of \$1, but the true consideration and agreed price of said assignment was the payment or royalty to plaintiff of one cent for each pair of hinges to be manufactured according to said invention during the term of said letters patent.

III. That plaintiff was paid said royalty of one cent for each pair of hinges sold from January 17, 1863,

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Statement of the Case.

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until March 5, 1864, without notice to him of any change in the company, and defendant has neglected and refused to pay anything to plaintiff since said date.

IV. That the defendant has, since said March 5, 1863, been continually engaged in the manufacture of plaintiff's invention under said letters patent, but has wholly failed to account to plaintiff therefor.

V. That the organization or reorganization of the American Spiral Spring Butt Hinge Manufacturing Company, on August 15, 1863, was without notice to plaintiff, and was, so far as it affects plaintiff or his rights, colorable only.

VI. That the defendant accepted said letters patent of plaintiff's invention, pursuant to the terms of, and by virtue of the assignment of January 17, 1863, from plaintiff to the American Spiral Spring Butt Hinge Manufacturing Company, and subject to the payment of the royalty of one cent for each pair of hinges manufactured under said letters patent.

VII. That Mr. Hayes, Andrew J. Riker, and John S. Neville, with whom the contract for the purchase and assignment of said invention was made by plaintiff, made the same as officers of and for account of the American Spiral Spring Butt Hinge Manufacturing Company, and were officers and directors of the defendant, which claimed to be the owner of and accepted the said letters patent under said assignment of January 17, 1863.

VIII. That defendant, by discharging a part of their hands employed, and not paying promptly those employed, by not employing a sufficient number of hands, and requiring of plaintiff to manufacture a larger number of hinges than he could produce with the means furnished by defendant, and by other unjust and unreasonable exactions, compelled the plaintiff to

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Appellant's points.

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resign his position as foreman of defendant's factory without any fault upon plaintiff's part.

And as conclusions of law: *First.* That the defendant is estopped from denying that it contracted with plaintiff for the purchase of said invention.

I. Because no notice was given to defendant of any attempted or actual change in the organization of the company.

II. Because it accepted said letters patent under said assignment with full notice of its terms.

III. Because it adopted the conditions of said assignment and continued to pay the royalty.

IV. Because it compelled the plaintiff to resign his position as foreman, and defendant can take nothing by its wrongful act.

*Second.* That plaintiff is entitled to an accounting from defendant of all the hinges manufactured or sold by it since March 5, 1864, under said letters patent, and to be paid a royalty of one cent for each pair of hinges made.

*Third.* That the defendant exhibit before the referee to be appointed, its books of account and of manufacture, showing the number of hinges manufactured or sold by the defendant since March 5, 1864.

*Fourth.* That the plaintiff be at liberty to apply on the foot of the decree herein for a further accounting by defendant for said hinges manufactured or sold by defendant herein after this date, during the existence of said letters patent, upon due proof to this court of the failure of the said defendant to account for any of said hinges hereafter manufactured or sold by it.

*Fifth.* That a decree be entered in accordance herewith.

All of the foregoing findings of fact and law were excepted to by the defendant.

*Theodore R. Shear*, attorney, and *Elihu Root*, of

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**Appellant's points.**

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counsel, for appellant, on the questions discussed by the court, urged :—I. The judgment is erroneous, because it includes royalty upon hinges, manufactured and sold more than six years before the commencement of the action, any right of recovery for which was barred by the statute of limitations. The action was commenced March 7, 1877. The second conclusion of law under which the referee took and stated the account, includes all hinges manufactured or sold by the defendant since March 5, 1864. Either the plaintiff's right of action does not accrue under his alleged contract until the termination of the letters patent, which will be in December, 1880, that is to say, it has not yet accrued ; or it accrued when the hinges were manufactured or sold. In the former case, of course, this action could not be maintained. In the latter case, both principal and authority are conclusive that it cannot be maintained for any sums the right to which accrued more than six years before the commencement of the action (*Code of Pro.* § 383 ; *Davis v. Gorton*, 16 *N. Y.* 255 ; *Rider v. Union India Rubber Co.*, 5 *Bosw.* 86 ; *S. C.*, *aff'd* 28 *N. Y.* 379). The fact that there is an accounting involved in this action, does not take it out of the statute of limitations. It is only where there has been a mutual, open, and current account, where there have been reciprocal demands between the parties, that the cause of action is deemed to have accrued from the time of the last item (*Code of Pro.* § 386 ; *Albro v. Figuera*, 60 *N. Y.* 630 ; *Hultlander v. Thompson*, 5 *Hun*, 348). The report of the referee in accordance with which the judgment is entered, treats the plaintiff's cause of action as accruing from time to time, as the hinges were manufactured and sold, and allows interest upon the sales of each year from 1864 to the time of the report. We thus have judgment for principal and interest upon a cause of action on simple contract, which accrued and

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Appellant's points.

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could have been sued upon thirteen years ago. This cannot be sustained.

II. The judgment should be reversed, because it appears by the evidence that the defendant was not incorporated at the time of the alleged contract. It seems to be supposed, on the part of the plaintiff, that the effect of this undisputed fact is evaded by the fifth finding of fact, that the organization (or, as it is called, reorganization) of the defendant on August 15, 1863, was without notice to the plaintiff, and was, so far as it affects the plaintiff or his rights, colorable only. It matters not whether it is called an organization or a reorganization, the defendant was a new and distinct corporate entity, not in existence at the time the contract was made; and while the effect of a contract made by the promoters of the defendant in anticipation of the defendant's formation, or of a contract made by a preceding corporation to the rights of which the defendant succeeded by assignment, might be the same as if the contract were made by the defendant, that is another and a different cause of action, and depends upon facts not alleged in the complaint in this action, not met by the answer, and not properly before the court for its determination. The action is upon a contract made by this defendant, and not upon any obligation devolved upon it by authority of its relation to any preceding persons or corporation. Not only were there no allegations to this effect in the complaint, although the plaintiff had full notice of the time of the defendant's organization by its answer, and full opportunity to amend accordingly, but, throughout the evidence, no testimony was offered by the plaintiff, and no testimony was permitted on the part of the defendant to show what were the relations between the defendant and the preceding company, or what rights or obligations were devolved upon the defendant by those relations.



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Respondent's points.

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III. The judgment is erroneous in including two cents for each pair of double spring hinges made by the defendants, upon the theory that each double hinge is equivalent to a pair of single hinges. This is an unwarrantable extension of the terms of the contract. A pair of hinges is a pair of hinges; and it is no more because by putting in two springs instead of one a door can be made to swing better. The plaintiff himself does not assert that a double-acting hinge would be expressed by the term "a pair of hinges," but says, that if double-acting hinges are wanted this is expressed.

*Sigismund Kaufman*, attorney, and *Lewis Sanders*, of counsel, for respondent, on the questions discussed by the court, urged:—The defense appears to be this: 1. That the first assignee of plaintiff's invention was a prior company of the same name, merged in the present one. 2. That the assignee of a non-negotiable chose in action, without notice for value, takes it discharged of the assignor's obligations, the same as negotiable paper before due. (a) The first answer to these propositions is that none of them are pleaded. The second is that plaintiff never had any notice of a second company; never assented to any mere assignment or contract. 3. The answer admits letters patent were issued to it. The patent shows the assignment was from plaintiff. Defendant cannot deny it (*Cook v. Barr*, 44 *N. Y.* 158; *Fearing v. Irwin*, 4 *Daly*, 396; *Robbins v. Codman*, 4 *E. D. Smith*, 325; *Miller v. Moore*, 1 *Id.* 743). The recitals in the patent bind defendant (*Hardenburg v. Lakin*, 47 *N. Y.* 111; *Atlantic Dock Co. v. Leavitt*, 54 *Id.* 38; *Carver v. Jackson*, 4 *Pet.* 83; *Crane v. Morris*, 6 *Id.* 611; *Dem v. Cornell*, 3 *Johns. Cas.* 176). 4. Defendant did have notice of the terms of the assignment, and paid the royalty until March 5, 1864. 5. There is no evidence defendant

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paid anything for the assignment, and it is not, therefore, a holder for value. 6. The old Code provides, section 112, that in case of an assignment of a chose in action, the action by the assignee shall be without prejudice to any set-off existing at the time of or before notice of the assignment. This preserves the old common law rule, where action had to be in name of assignor. A purchaser of a chose in action must always abide the case of the person from whom he buys, and he stands entirely in the place of the latter (*Crane v. Turner*, 67 *N. Y.* 439; 61 *Id.* 88-105; 64 *Id.* 220-225; 50 *Id.* 66; 26 *How.* 161). 7. Defendant, holding as assignees of the patent, cannot repudiate its terms. By claiming the fruits of the assignment they must bear its burdens and ratify all the means by which it was obtained (*Fowler v. N. Y. Gold Exchange Bank*, 67 *N. Y.* 143, and cases there cited; *Qui sentit commodum sentire debet et onus*, *Brown's Leg. Max.* 682; *Wood v. Perry*, 1 *Barb.* 131; *Chamberlin v. Day*, 3 *Cow.* 353; *Countryman v. Boyer*, 3 *How.* 389).

BY THE COURT—CURTIS, Ch. J.—The defendant is not in a position to defeat the plaintiff's claim for compensation, for the use and enjoyment of his invention, because it was not, as it insists, at the time the plaintiff's assignment bears date, a corporation duly organized, under the laws of the State of New York, and was not in existence. The letters patent for the plaintiff's invention issued to and were accepted by the defendant at a time subsequent to August 26, 1873, when the defendant alleges it was so duly organized as a corporation, and ever since the defendant has manufactured under it. As the plaintiff had no notice that the defendant was not duly organized, when he executed the preliminary assignment of the invention, and afterwards caused the issue of the letters patent to the defendant, at a time when it was duly organized, which

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issue was accepted by the defendant, and ratified by user and the payment of the accruing royalties thereunder to the plaintiff, until the defendant compelled him to leave its employ, no reason exists why the defendant should avoid its liability. If the defendant held itself out as a corporation, when not duly incorporated, and preliminary steps were taken, which resulted after it was duly incorporated in the issue to it, and the vesting in it of the letters patent of the plaintiff's invention, the defendant, after acceptance and enjoyment and part payment at the rate claimed by plaintiff, and without notice to plaintiff of any defect in its corporate existence, at a period previous thereto, is estopped from avoiding the obligation to pay the plaintiff.

The questions are very much narrowed by the pleadings, though a wide field was presented on the argument.

The instruments under which the defendant has the use of the plaintiff's invention, and upon which the plaintiff claims, are under seal, and there appears to be no ground afforded in the case, for sustaining the defendant's plea of the statute of limitations.

The evidence shows that one pair of double-acting hinges is composed substantially of two pairs of single-acting hinges, and sustains the findings that each of the double-acting hinges comprise two pairs of single hinges.

There is nothing presented in the case and exceptions that leads me to the conclusion that there should be a reversal of the judgment.

The judgment and order appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

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Statement of the Case.

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CHARLES N. DURANT, PLAINTIFF, v. WILLIAM  
P. ABENDROTH, IMPEADED, &C., DEFENDANT.

I. BANKRUPTCY PROCEEDINGS.

1. *Res adjudicata*, as to special partnership.

(a) Van Dolsen v. Abendroth, 43 N. Y. Superior Ct. 470, followed.

II. DISMISSAL OF COMPLAINT.

1. *Moving for, on several grounds, one tenable, others not.*

(a) EFFECT OF.

1. The fact that untenable grounds are also assigned, will not cure an erroneous ruling on an assigned tenable ground.

1. *This, although but a single exception is taken to the denial of the motion.*

2. *No cause of action proven.*

(a) WHAT MAY BE URGED IN SUPPORT OF THIS GROUND.

1. A defense established by conceded or undisputed facts, which shows that the claimed cause of action never existed.

1. E. G.: *Res adjudicata against plaintiff on his claimed cause of action.*

III. DIRECTION OF VERDICT FOR PLAINTIFF ON THE COURT'S OWN MOTION.

1. *Exception to, want of.*

(a) EFFECT ON DENIAL OF MOTION TO DISMISS COMPLAINT.

1. Does not affect defendant's right to a new trial, if his motion to dismiss was well founded.

1. *Exceptions ordered to be heard at general term.* This, although the case comes before the general term upon exceptions so ordered to be heard on the court's own motion.

IV. TRIAL.—CONDUCT OF.

See dismissal of complaint and direction of verdict, *supra*.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided March 3, 1879.*

This is a motion by defendant, Abendroth, for a new trial, upon exceptions taken at a jury trial, a verdict having been rendered in favor of plaintiff, by the direction of the court. The judge ordered the ex-

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Statement of the Case.

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ceptions to be heard in the first instance at the general term, and the judgment in the meantime suspended.

The plaintiff sued the defendants as copartners in the firm of Griffith & Wundram. The cause of action is a balance unpaid of an account stated. That the account was stated, and the balance sued on found to be due, is admitted by the answer of the defendant, Abendroth, he being the only defendant who answered.

The answer set up that defendant Abendroth was not a general partner, but a special partner only, of the other defendants; that on November 23, 1872, the firm of Griffith & Wundram, and they individually, were duly adjudicated bankrupts; that plaintiff's claim was duly proved; that appellant was made assignee; that thereafter the firm was adjudged to be a special partnership; that the assignee paid on said claim a dividend; and that such adjudication had been in force more than one year before the commencement of this action, and now remains in full force and effect.

Upon the trial, the following proof was given in respect to the bankruptcy defense.

The petition in bankruptcy of George W. Wundram on his own behalf, and against his partner, John Griffith, dated November 23, 1872, and the schedules annexed.

The adjudication in bankruptcy, dated November 30, 1872, wherein it was "adjudged that John Griffith and George W. Wundram, and the copartnership of Griffith & Wundram, became bankrupt before the filing of the petition, and they are therefore declared and adjudged bankrupts accordingly."

The assignment of all the assets, real and personal, of the firm and the individuals.

The notice to the creditors of the meeting to prove their debts and choose an assignee, with an order of publication and due proof thereof. Proof of debt upon

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Statement of the Case.

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this claim showing that the said Griffith & Wundram, and the persons by and against whom a petition for adjudication of bankruptcy had been filed, at and before the filing of the said petition, were indebted in the sum claimed. That Joseph McDonald & Co., creditors of Griffith & Wundram, presented a petition to have certain claims against said firm that had been assigned to defendant reheard and disallowed, dated August 6, 1873.

That on this petition Judge BLATCHFORD ordered a rehearing on notice to all the creditors. On the same day the order was issued.

The report and opinion of the register, in which he determines as follows: "It appears from the evidence taken at this second general meeting of the creditors of the bankrupts, that John Griffith and George W. Wundram, the partners in this bankruptcy, were the general partners of the limited partnership of Griffith & Wundram, of which William P. Abendroth, the assignee in bankruptcy, was the special partner." The register, therefore, concludes: "the said William P. Abendroth is entitled to reserve and retain the dividend on those claims to his own use."

Upon this report Judge BLATCHFORD made this indorsement: "I concur in the conclusions of the register as to the claims above mentioned. October 13, 1875. SAMUEL BLATCHFORD, district judge." He also made an order for payment.

The election of, and order appointing defendant assignee of said Griffith & Wundram was also shown.

The report of the register shows: "Colwell Brothers" (the owners of said claim) "signed the paper at the first meeting of the creditors of the bankrupts, choosing Abendroth to be the assignee in bankruptcy of the estate and effects of the bankrupts;" the election of Abendroth was unanimous."

It was admitted that Mr. Abendroth, as such assignee, paid to said Colwell & Brothers, a dividend of

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Plaintiff's points.

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six per cent. out of the assets of the assigned estate. The complaint alleges that this payment was made on November 17, 1875, and the answer admits it, so that this payment was subsequent to the adjudication.

The court directed a verdict for plaintiff, exceptions to be heard in the first instance at the general term.

*Norwood & Coggeshall*, attorneys, and *Carlisle Norwood, Jr.*, of counsel, for plaintiff, on the questions considered in the opinion, urged:—I. The defendant's counsel moved for the dismissal on three distinct grounds, and took but a single exception to the denial of the motion. It follows that if the refusal of the court to dismiss can be sustained as to any one of the grounds of the motion, then a single exception to the three grounds stated was not well taken, and presents no question for review (*Coghlan v. Dinsmore*, 1 *Abb. Ct. of App.* 375; *Day v. Roth*, 18 *N. Y.* 448; *Haggart v. Morgan*, 5 *Id.* 422; *Buch v. Remsen*, 34 *Id.* 383). The motion to dismiss on the ground that plaintiff had not proved facts sufficient to constitute a cause of action against the defendant Abendroth was properly denied. The answer had admitted the liability of the copartnership of Griffith & Wundram, the defendant Abendroth simply contending that he was not a member of that firm. The proof was that he was a member of that firm, the same facts having been established as were shown when this court before held him liable in the case of *Durant v. Abendroth (ante)*.

II. If the defendant wished to have the right to review the ruling directing a verdict against him, he should not have applied to have the exceptions heard, in the first instance, at the general term, but should have allowed a judgment to be entered, and then could have appealed therefrom, or he might have made a motion for a new trial at the circuit or special term. But he has chosen to rely on his exceptions (*Price v. Keyes*,

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Plaintiff's points.

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1 *Hun*, 180, 182 ; Hoxie v. Green, 37 *How. Pr.* 97). (a) The Code distinctly points out that the exceptions only are to be heard, and numerous decisions have settled the practice. These decisions hold there are but three methods provided for reviewing exceptions. The review may be had by an appeal from the judgment ; by a motion for a new trial upon the exceptions at the general term, under such an order as was made in this case ; and by a motion for a new trial at the circuit or special term (Price v. Keyes, 1 *Hun*, 177 ; Sheaf v. Utica & B. R. R. Co., 2 *N. Y. Supreme Ct. [Thomp. & Cook]*, 388 ; Emmons v. Wheeler, 3 *Hun*, 545 ; McMicken v. Lawrence, 7 *J. & S.* 540). (b) A direction of a verdict against a defendant having made a defense, is a ruling by the court that the testimony or evidence produced by such party is insufficient to establish his defense. By such a ruling the effect of the defendant's evidence is passed upon, and in order to review such a ruling, there must be an exception by defendant (Requa v. Holmes, 16 *N. Y.* 201). Such a ruling is in fact the charge to the jury, and though consisting of but a single proposition, an exception must be taken in order to review it (Requa v. Holmes, *supra*). (c) Error cannot be assigned upon any ruling of the court in the progress of a trial, unless by the bill of exceptions it appears that an exception was taken to such ruling (Granger Iron Co. v. Street, 19 *Ohio*, 300).

III. As to the decision of this court at general term in Van Dolsen v. Abendroth : That decision has no application here. The following matters were admitted by the demurrer, and formed the basis of the general term decision, but such matters are not shown at all in this case. 1. That on or about November 23, 1872, voluntary and involuntary proceedings were duly instituted in the United States district court, wherein said firm were duly adjudged bankrupts. As



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has been pointed out, the defendant's proof has not sustained this allegation which the demurrer admitted. 2. That such proceedings were had in the bankruptcy matter to which plaintiff and defendant were parties that it was duly adjudged and determined that John Griffith and George W. Wundram, the bankrupts in this bankruptcy, were the general partners in the limited partnership of Griffith & Wundram, of which William P. Abendroth was the special partner. As has been urged on this brief, the proof does not show such an adjudication. And the attention of the court is especially directed to the fact that what the respondent relies on as a judgment is only an opinion of a register in bankruptcy. A register in bankruptcy has no authority to adjudicate such a question.

*Arnoux, Ritch & Woodford*, attorneys, and *Wm. Henry Arnoux*, of counsel, for defendant.

BY THE COURT.—CURTIS, Ch. J.—The principal question presented is very much the same as that passed upon by the general term in *Van Dolsen v. Abendroth*, 43 *N. Y. Superior Ct.* 470.

In this latter case, the plaintiff Van Dolsen was a party to the proceedings in bankruptcy, where it was competent to have Abendroth adjudged a general partner, if he had elected to interpose such a claim and establish it; but he did not, and participated in the dividend under the adjudication in bankruptcy, in which Abendroth was held a special partner. The court considered that it would be inconsistent with well-settled rules, that this matter, which was, or could have been determined in the proceedings in the United States district court, should be allowed to be litigated here, and overruled the demurrer to the defendant's answer.

The answer in the present case is similar, but the question comes before the court after a trial, upon exceptions.

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Opinion of the Court, by CURTIS, Ch. J.

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The evidence shows, that the plaintiff's assignors, Colwell & Brother, were parties to the proceedings in bankruptcy, and received a dividend under the adjudication. They had their opportunity to show that the defendant Abendroth was liable as a general partner. They knew of the advertisement of the limited partnership. If they wished to contest its legality, they had their recourse to the records in the county clerk's office, and to the bankrupts, and to their books and papers in the hands of the assignee, the defendant, and an opportunity in the federal court of being heard, and of having an adverse decision reviewed. It was in evidence that at the second general meeting of the creditors, the register held, that it appeared by the evidence that Griffith & Wundram, the bankrupts, were the general partners of the limited partnership of "Griffith & Wundram," and that the defendant Abendroth was its special partner, and it was also shown, that the report and certificate of the register were approved by the United States district judge. The decretal order of the judge recites that due notice had been given of such second general meeting to all the creditors of the bankrupts, as appeared by the proof thereof, duly filed. In all these bankruptcy proceedings the plaintiff's assignors were actors, and participated in the results. If these bankruptcy proceedings were irregular, or the decision erroneous, they had then and there an ample opportunity for a rehearing, or a review. But having proceeded thereunder without raising this question, which they could have done, and having gathered all the fruits of that adjudication, they are debarred from raising it here.

There is nothing that appears at the trial of the present case in regard to this question to take it out of the scope of the decision in the corresponding case of Van Dolsen v. Abendroth, above referred to.

At the close of the plaintiff's case, the defendant

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moved to dismiss the complaint, which the court denied for the present. At the close of the testimony, the defendant moved to dismiss the complaint. That motion was denied and the defendant excepted.

This motion was substantially a motion to dismiss the complaint, for the reason that the evidence failed to establish a cause of action against the defendant, Abendroth. If the court ought to have granted this motion, to dismiss the complaint, the fact that other reasons or grounds which may not have been tenable were also mentioned, does not sustain an erroneous ruling denying it. A motion to dismiss, on the ground that no cause of action is proved against the defendant, may present a question vital to the litigation. The law does not contemplate, that where no cause of action is proved, the court should by any informality in the form of the motion to dismiss the complaint, be placed under the necessity of finding that there is one proved, and what it is, and of directing a verdict accordingly.

The court directed a verdict for the plaintiff for \$7,051.24, and ordered the exceptions to be heard in the first instance at the general term, but the case does not show that these directions were made upon the motion of either party, or that any exception was taken to the direction for a verdict. This subsequent disposition of the case did not affect the accrued right of the defendant, if there was no cause of action proved against him, and he had moved for a dismissal of the complaint and excepted to the denial of his motion.

Defendant's exception should be sustained, and the verdict set aside, and there should be a new trial, with costs to appellant to abide the event.

SEDGWICK and FREEDMAN, JJ., concurred.

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Statement of the Case.

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CHARLES FAULKNER, AND OTHERS, PLAINTIFFS,  
v. WILLIAM T. HART, AND OTHERS, DEFEND-  
ANTS.

I. RESPONDEAT SUPERIOR.

1. EXCEPTION FROM THE RULE, OF AN EMPLOYER OCCUPYING A REPRESENTATIVE OR OFFICIAL CHARACTER; WHO DO NOT FALL WITHIN.

(a) *Trustees for holders of railroad mortgage bonds, in possession of and operating the railroad, do not fall within.*

II. COMMON CARRIERS.

1. Railroads.

(a) *Liability as common carriers after transportation to place of destination—when does it cease?*

1. QUESTION IS TO BE DETERMINED BY THE LAW OF THE PLACE OF DELIVERY.

1. In a case where the shipper must be deemed to know the usage of the carrier in delivering freight at the place of destination, and the law of that place in respect to it, and the inference from the evidence is in conformity with the view that the original contract called for, and the shipper contemplated a delivery in accordance with the usage and law prevailing at that place, the facts are not of a character to appeal very strongly to the courts of this State to give the parties a remedy in conflict with the law of that place, as defined by its courts.

III. MASSACHUSETTS.

1. COMMON CARRIERS; LIABILITY OF AS, WHEN THE LAW OF MASSACHUSETTS GOVERNS.

(a) By the usage of railroad companies no freight was delivered between 5½ P. M., on Saturday night until the next Monday morning. All freight remaining undelivered at 5½ P. M. Saturday was stored in the company's freight warehouse, ready for delivery when called for on the following Monday.

HELD, UNDER THE LAW OF MASSACHUSETTS, that although the train containing the goods had arrived on Saturday at 3½ P. M., and the consignee was in attendance to receive them, yet as it did not arrive in time for the de-

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Plaintiffs' points.

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livery of the goods to the consignee before 5½ P. M. of that day, the company's liability as common carrier ceased upon a discharge of the goods from the cars to the company's freight warehouse.

**IV. PERFORMANCE.****1. LAW OF PLACE OF.**

(a) Governing matters connected with the performance of a contract made elsewhere.

*See* CARRIER, *supra*.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided March 8, 1879.*

This case comes before the court in a controversy submitted under section 1279 of the Code. The facts appear in the opinion.

*McDaniel, Lummis & Souther*, attorneys, and *Everett P. Wheeler*, of counsel, for plaintiffs, argued:—I. There can be no question that the weight of authority, both in this country and in Europe, is that the words "to deliver goods to a consignee," in an agreement for the carriage of goods, do not mean to deposit them in a warehouse, wharf or station, without giving the consignee notice of their arrival and reasonable opportunity to take them away. Originally, common carriers undertook to deliver goods to the consignee at his warehouse or place of business. When steamships acquired the greater part of the carrying trade by sea, and railroads the greater part of it by land, it was found that to do this was inconsistent with the convenience of business, and the rule was so far modified as to allow a deposit of the goods in a suitable wharf or warehouse, with notice to the consignee, and a reasonable opportunity given to him to take them away, to take the place of a delivery to him personally (*McAndrew v. Whitlock*, 52 N. Y. 40; *Ostrander v. Brown*, 15 Johns. 39, PLATT, J.; 2 Kent's Com. 605; *Richardson v. Goddard*, 23

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Plaintiffs' points.

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*How. U. S.* 38; *Gatliff v. Bourne*, 4 *Bing. N. C.* 314; 3 *Mann. & Gr.* 337; 11 *Clarke & Fin.* 45). To the same effect are *Price v. Powell*, 3 *Comst.* 322; *Zinn v. N. J. Steamboat Co.*, 49 *N. Y.* 442; *Sherman v. Hudson R. R. R.*, 64 *Id.* 254; *The Sultana v. Chapman*, 5 *Wis.* 454; *Slade v. Payne*, 14 *La. Ann.* 453; *Dean v. Vaccaro*, 2 *Head*, 489; *The Peytona*, 2 *Curtis C. Ct.* 21; *Graves v. Hartford & N. Y. Co.*, 38 *Conn.* 143; *Chicago & Rock Island R. R. v. Warren*, 16 *Ill.* 502; *Moses v. Boston & Maine R. R.*, 32 *N. H.* 523; *The Tangier*, 1 *Clifford*, 396; *Redfield on Carriers*, §§ 110, 111; *Story on Bailments*, § 545.

II. It is contended by the defendants that the two Massachusetts decisions mentioned in the agreed statement establish that there is a local law in Massachusetts which differs from that of the rest of the world, and that the contract in question is to be construed with reference to this local law. It is believed that neither of these positions is tenable. The Massachusetts cases do not purport to hold that there is any such local law. They are decisions in reference to a principle of general commercial law, and do not purport to be, and are not, in fact, based upon any local statute, usage or custom. Therefore, although due weight will undoubtedly be given to these decisions, they are not binding upon other courts (*Swift v. Tyson*, 16 *Pet.* 1; *Meade v. Beale*, *Taney*, 339; *Austin v. Miller*, 5 *McLean*, 189; *The George*, *Olcott*, 89; *Pine Grove v. Talcott*, 19 *Wall.* 666; *Robinson v. Commercial Ins. Co.*, 3 *Sumner*, 220; *Richardson v. Goddard*, and *The Tangier*, *supra*). In like manner, the supreme court of New Hampshire, in an action for the non-delivery of goods, agreed to be transported to Boston, which were burned before delivery to the consignee, refuse to follow the Massachusetts cases (*Moses v. Boston & Maine R. R.*, 32 *N. H.* 523). The language of Blackstone in his Commentaries, vol. 1, p. 273, and vol.

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4, p. 67, is in point. Undoubtedly the books of reports of cases are presumptive evidence of the law. But as Benedict, in his work on Admiralty, section 313, b, well says: "They are, however, evidence which may be rebutted, and when successfully rebutted their evidence cannot prevail. No number of erroneous decisions can furnish sufficient reason for deciding contrary to law. When a decision has been followed, without hesitation or consideration, by many others, it is but one decision, of which the others are but echoes. The question always remains, what is the law, and decisions are to be weighed, not counted." So also, 1 *Kent Com.* 477: "It is probable that the records of many courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."

III. The Massachusetts cases referred to in the agreed case are not sufficient for the defendants' purpose, even if they constituted a rule of decision for this court. It is agreed in the statement, that the Norwich and New York Transportation Company, at New York receipted for the cases in good order, to be transported to Boston and delivered to the plaintiffs' firm in Boston. In the cases of *Rice v. Hart*, and of the *Norway Plains Company v. Boston and Maine Railroad*, it did not appear that there was an express agreement to deliver to the consignee. C. J. SHAW limits the latter decision to a case where there is no special agreement to deliver to the consignee. The case of *Stevens v. Boston & Maine Railroad* (1 *Gray*, 277), shows that where there is an actual refusal by the common carrier to deliver, the doctrine in the *Norway Plains* case is not applied, even by the local courts of that State. It may be claimed that the case of *Rice*

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Plaintiffs' points.

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v. Hart, mentioned in the agreed statement, overrules this last mentioned decision. But as the contract in suit was made before the decision in *Richardson v. Hart*, this court will not give to that a retroactive effect so as to change the character of a previous contract (*Harris v. Jex*, 55 *N. Y.* 421, and cases cited).

IV. The position taken by the defendants involves another fallacy, to wit: That when a contract is made in one State to be performed partly in that State and partly in other States, the construction of the language used in the contract is always to be determined by the law of the State where the performance is to terminate. It is, however, submitted that the decision in the case of a contract made in one State to be performed in another depends upon the question, was the contract made in reference to the laws of the place of performance? (*Donnelly v. Corbett*, 3 *Seld.* 500; *Baldwin v. Hale*, 1 *Wall.* 223; *Dyke v. Erie Railway Co.*, 45 *N. Y.* 113.) Now it is not to be supposed that parties contracting in one State know or contract with reference to peculiar and unique decisions of another State as to what the law merchant is. As already shown, that is presumed to be the same everywhere. A contract made in New York, which uses the words "to deliver to Faulkner, Page & Co." is not to be construed as to the meaning of the word "deliver," with reference to certain decisions of the local Massachusetts courts. It would seem almost too clear for argument, that when two men in the State of New York use the word "deliver," they use it in the sense in which people in that State commonly understand it, and not in the sense in which people in Boston may understand it. The very decisions cited for the defendants admit this. They maintain that in the absence of such a contract the carrier is not bound to deliver to the consignee, but performs his whole duty as carrier by delivering his goods, not to the consignee, but to him-



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Plaintiffs' points.

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self as warehouseman. But they never held that if he does contract to deliver to the consignee, he is not bound by his contract. The legislature of the State of Massachusetts has no power to make a law impairing the obligation of a contract to deliver to the consignee; much less can their local courts impair the obligation of such a contract, and say that it does not mean what it says, but that it means something else quite different (*Gelpcke v. Dubuque*, 1 *Wall.* 175, 206; *Olcott v. Fond du Lac*, 16 *Id.* 678). The presumption is, in the absence of evidence to the contrary, that the words in the contract were used by the parties in their ordinary meaning, and not in a special, local and technical sense. Indeed, it is held by the courts of this State that even a local usage to the contrary will not avail in an action against a carrier on an agreement to deliver to the consignee (*Ostrander v. Brown*, 15 *Johns.* 39). And the authorities are uniform that a local usage of any sort is not valid in opposition to the express language of a contract between parties, and that if the language of the contract is explicit, it cannot be varied or contradicted by parol evidence, or a meaning given to the contract different from that called for by its terms (*Collender v. Dinsmore*, 55 *N. Y.* 200; 1 *Greenl. Evid.* § 295; *Broom Legal Maxims*, 477).

V. The regulation of the defendants, closing their freight station at half-past five on Saturday, was unreasonable. If they would terminate their liability as common carriers, they certainly should afford to a consignee present to receive the goods an opportunity to take them away; especially on Saturday. The validity of this regulation does not appear to have been considered by the Massachusetts court. But it is only reasonable by-laws and regulations that are valid (*Elwood v. Bullock*, 6 *Ad. & Ell. N. S.* 383; *Barney v. Steamboat Co.*, 67 *N. Y.* 301; *Hibbard v. New York Central R. R.*, 16 *Id.* 455).

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Defendants' points.

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*Weeks & Forster*, attorneys, and *George H. Forster* with *G. W. Baldwin*, of counsel, for defendants, on the questions considered by the court, argued :—I. As trustees for the bondholders of the insolvent Boston, Hartford and Erie Railroad Company, no negligence can be imputed to defendants. They are running and operating the road as such trustees. They have not assumed to act other than as such trustees, and have not held themselves out as carriers of freight other than as such trustees. No personal neglect is imputed to them, either in the selection of agents or in the performance of any duty. They are, therefore, not liable to this claim of the plaintiffs. The doctrine of *respondeat superior* does not apply to cases where the employer occupies a representative or official character, and has not individual or personal interest in the property or business in which the subordinate is employed (*Cardot v. Barney*, 63 *N. Y.* 281 ; *Lane v. Cotton*, 1 *Ld. Mansf.* 646 ; *S. C.*, 1 *Salk.* 17 ; *Whitfield v. Lord Ledespencer*, *Cowp.* 754 ; *Hall v. Smith*, 2 *Bing.* 156 ; *Duncan v. Findalter*, 6 *Cl. & Fin.* 894). The principle was recognized in *Bush v. Steinman* (1 *B. & P.* 404), and the defendant held liable for the reason that the work was carried on for his benefit.

II. By the law of Massachusetts proprietors of a railroad, who transport goods over their road for hire, and deposit them in their warehouse without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars, and placed in the warehouse, but are liable as warehousemen only for want of ordinary care, although the owner or consignee has no opportunity to take the goods away before the fire. The proprietors of a railroad are not obliged to give

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notice to the consignee of the arrival of goods transported by them, in order to exonerate themselves from their liability as common carriers. By the law of the place of delivery, therefore, the liability of the defendants, if common carriers, became merely that of warehousemen, as soon as the goods had been deposited in the freight depot, and delivery from themselves as common carriers to themselves as keepers for hire, discharged their responsibility as common carriers (*Norway Plains Company v. Boston & Maine R. R.*, 1 *Gray*, 263; *Rice v. Hart*, 118 *Mass.* 201). The rule thus established, after argument by eminent counsel and upon much consideration, and supported by great force of reasoning, has ever since been considered settled law in that commonwealth (*Sessions v. Western R. R.*, 16 *Gray*, 132; *Rice v. Boston & Worcester R. R.*, 98 *Mass.* 312; *Miller v. Mansfield*, 112 *Id.* 260; *Stowe v. New York, Boston & Providence R. R.*, 113 *Id.* 521). And it has been recognized in the ablest decisions, which have taken a different view of the subject, as a rule of a definite and practicable character and of easy application (*Moses v. Boston & Maine R. R.*, 32 *N. H.* 523, 543; *Graves v. Hartford & New York Steamboat Co.*, 38 *Conn.* 143, 151). This case does not require us to consider whether the rule should extend to a case in which the goods have not arrived at their final destination, but are held by one railroad corporation in a warehouse at the end of its own line, with the duty of forwarding them by another carrier to their ultimate destination, as to which the judgments of the supreme court of the United States in *Railroad Co. v. Manufacturing Co.* (16 *Wall.* 318), and of the court of appeals of New York, in *McDonald v. Western Railroad* (34 *N. Y.* 497), seem to be in conflict with the opinions expressed in *Denny v. New York Central Railroad* (13 *Gray*, 481, 487), and *Judson v. Western Railroad* (4 *Allen*, 520, 523). The other cases

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cited for the plaintiffs, in the supreme court of the United States, the house of lords, the court of appeals of New York, and this court, were cases of common carriers by sea, who have not the same means of warehousing goods at their destination, and are not therefore within the rule which governs railroad corporations (see also *Fenner v. Buffalo & State Line R. R. Co.*, 44 *N. Y.* 505, 511; *Henshaw v. Rowland*, 54 *Id.* 242; *Pelton v. Rensselaer & Saratoga R. R. Co.*, 54 *Id.* 214).

III. Inasmuch as delivery of the goods was to be made in Boston, where the loss occurred, the law of Massachusetts should control the rights of the parties with respect to such delivery. This rule has been applied in several carefully considered cases where the facts are analogous to the facts here (*Barber v. Wheeler*, 6 *Am. R.* 434; *Grey v. Jackson*, 12 *Id.* 1; *Knowlton v. Erie R. R.*, 19 *Ohio St.* 260; *S. C.*, 2 *Am. R.* 395; *M. & St. P. R. R. v. Smith* [*Ills. S. C.*, 1875], 7 *Chic. Leg. News*, 174).

IV. There is no hardship in applying this doctrine to the case under consideration. The plaintiffs were both consignors and consignees; as consignees, doing business in Boston, they must be presumed to know the laws of the State, of which three of them were, and for upwards of ten years had been residents and citizens, and that the goods were at their risk when discharged from the cars upon the freight platform. As this risk was an insurable one they might, if they had chosen, have obtained complete protection. Suppose, on the other hand, the defendants had obtained insurance on these goods against their liabilities as carriers, they could have recovered nothing from the underwriters, because the goods were destroyed after their liability as carriers had ceased (*Norway Plains Co. v. B. M. R. R.*, 1 *Gray*, 263; *Rice v. Hart*, 118 *Mass.* 201). If the plaintiffs desired that the goods in ques-

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tion should be disposed of or delivered, upon their arrival in Boston, in a manner unusual to the course of business there, they should have given special directions to that end (*Van Santvoord v. St. John*, 6 *Hill*, 160 ; *Rawson v. Holland*, 59 *N. Y.* 618).

V. The duty imposed on the defendants, if common carriers, was to carry and deliver. What other construction can be put upon a contract to deliver than to deliver in accordance with the laws and usage of the place of delivery ? It is well settled that a mere usage, which is matter of evidence, is, when proven, to control the question of delivery, because such usage takes the place of general law, and the presumption therefore arises that it is in view of parties who contract about its subject matter (*Angell on Carriers*, § 301 ; *McMasters v. Penn. R. R.*, 69 *Penn. St.* 374). But in the case under consideration the usage and the general law, as expounded by the courts, are in accordance, and the goods were delivered in strict conformity therewith. The contention of the defendants is that they are not liable as common carriers, because their contract as carriers had been fully performed, and "matters connected with the performance are regulated by the law prevailing at the place of performance" (*Scudder v. Union Bank*, 1 *Otto* [91 *U. S.*] 413). Suppose there had been a positive statute of the State of Massachusetts, enacting that the liability of a carrier should cease when the goods had been discharged at the end of the route, into a suitable warehouse, or the charter of the company had contained a special provision to the same effect. The effect of such provision in the charter of a railroad company was considered in *Railroad Co. v. Manufacturing Co.* (16 *Wall.* 326) ; and although it was held that the exemption did not apply to the circumstances of that case, it appears to be conceded that the liability of the carrier would have been determined thereby, if the goods in question had

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reached their final destination (and see *Mills v. Mich. Centr. R. R.*, 45 *N. Y.* 626). Suppose, on the other hand, there had been a positive statute of the State of New York, enacting that the liability of a carrier should, in all cases, continue until the goods entrusted to him had been actually delivered to the consignee, such statute liability would be limited to defaults occurring within the State. *Whitford v. Panama R. R.* (23 *N. Y.* 465), where it was held that a statute giving an action for damages resulting from negligence did not apply where the injury was committed in a foreign country, even though the negligence was that of a corporation chartered by the State of New York, and which made the contract in such State for the conveyance of the injured party over its road. This is not a case where, in answer to a suit brought in one jurisdiction upon a liability which occurred in another, the defendant attempts to avail himself of the laws of the place where the liability occurred, which abridge or limit the remedy therefor. There is no question of the extent of remedy here. It is the liability which is denied. The case, therefore, is taken out of the range of the numerous decisions, which hold that as to the remedies for contracts broken the *lex fori* is to govern, and that statutes of other States, which limit the remedies, either in time or amount, have no application.

VI. The plaintiffs cannot claim here that the defendants were carriers between New York and Boston. It is not true in point of fact. Their obligations as carriers began when they received the goods from the Norwich & Worcester Railroad Company. But suppose the plaintiffs' claim to be true. The case would then fall within the rule, which is very succinctly stated, with its limitations, in *Dyke v. Erie Railway Co.* (45 *N. Y.* 113), that "the *lex loci contractus* determines the nature, validity, obligation and legal effect of the con-

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Defendants' points.

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tract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as when it is to be performed in another place, and then, in conformity to the presumed intentions of the parties, the law of the place of performance furnishes the rule of interpretation." Still more in point is *Story on Contracts*, section 655, where it is said that "if a contract is to be performed partly in one country and partly in another country it has a double operation, and each portion is to be interpreted according to the laws of the country where it is to be performed" (see also 1 *Chitty on Cont.* [11 ed. 130]; *Scudder v. Union Nat. Bank*, 1 *Otto*, 413; *M. & St. P. R. R. v. Smith* [Ill. S. C., 1875], 7 *Chic. Leg. News*, 174; *Pomeroy v. Ainsworth*, 22 *Barb.* 118; *Andrews v. Pond*, 13 *Pet.* 78; *Kessler v. N. Y. C. & H. R. R. Co.*, 61 *N. Y.* 538; *Pope v. Nickerson*, 3 *Story*, 474, 485; *Addison Cont.* § 240).

VII. The general obligation created by the law of the place of delivery, in respect to the mode of delivery by a carrier controls. The plaintiffs were bound to know such law and bound by it, and the defendants are entitled to its protection. It was clearly recognized in *Ranson v. Holland* (59 *N. Y.* 613), that such a law would protect the carrier, and that when by the law of the place of delivery the carrier had the right to store the goods, then the nature of the bailment changes, and he is relieved from the stringent responsibility originally assumed, and the liability of a warehouseman is substituted (*Rawson v. Holland*, 59 *N. Y.* 615, 6, cites *Van Santvoord v. St. John*, 6 *Hill*, 157; *Goold v. Chapin*, 20 *N. Y.* 259; *McDonald v. Western R. R. Co.*, 34 *Id.* 497; *Root v. Great Western R. R. Co.*, 45 *Id.* 524; *Mills v. Michigan Central R. R. Co.*, *Id.* 622; *Nutting v. Connecticut River R. R. Co.*, 1 *Gray*, 502; see also, *Pelton v. Rensselaer & Saratoga R. R.*



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Co., 54 *N. Y.* 214). The inference from the opinion of the court in *Shelton v. Merchants Dispatch Trans. Co.* (59 *N. Y.* 264), is that if the law of Illinois, the place of the fire, had been proved in that case, it would have controlled. Here the law of Massachusetts appears from the case, and should control.

BY THE COURT.—CURTIS, Ch. J.—This controversy is presented in a case agreed upon by the parties and submitted without action.

The plaintiffs claim that the defendants are liable as common carriers, for a failure to deliver to them ten cases of merchandise, sent by the plaintiffs' firm in New York to the plaintiffs' firm in Boston. This merchandise arrived in Boston on Saturday, at 3½ p. m. but not in time to be delivered to the plaintiffs' messenger before half-past five o'clock on Saturday afternoon, at which hour the yard and freight-station of the defendants' road, as well as those of all other railroads in Boston, are closed for the delivery of freight until the ensuing Monday. The merchandise in question was discharged from the cars into the defendants' warehouse on Saturday afternoon, too late for delivery that day, and the same night they were destroyed by fire, without fault or neglect on the defendants' part.

The facts presented in the case disclose no reason for exonerating the defendants from liability as common carriers, on the ground that they were trustees or public officers of an insolvent corporation, and as such acting in a different capacity than that of carriers of freight. They were in possession and operating a railroad, from Putnam, in Connecticut, to Boston, as trustees for the holders of the mortgage bonds of The Boston, Hartford and Erie Railroad Company, the terminal road over which this merchandise was for-



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warded. They received the goods to transport to Boston from Putnam as carriers of freight.

The cases of *Norway Plains Company v. Boston and Maine Railroad Co.* (1 *Gray*, 263), and *Rice v. Hart* (118 *Mass.* 201), referred to in the stipulation as evidence of the law of Massachusetts, indicate a careful consideration of the nature of the liability which attaches upon a state of facts such as is submitted to us in the agreed statement.

The last case above mentioned was similar to the present, arising upon a like state of facts, and the action was there brought to recover against these same defendants, for a loss of goods arriving at the same time and transferred to the defendants' freight-house that afternoon and destroyed by the same fire.

In that case, as in this, the agent of the consignee was at the station after the arrival of the goods, prepared to receive them. In that case it was held that the liability of the railroad corporation as a carrier ended before the loss of the goods. The decisions referred to in the stipulation as evidence of the law of Massachusetts hold that the railroad company, upon the state of facts presented here, are responsible as common carriers, until the goods are removed from the cars and placed on the platform; that if, on account of their arrival at night, or at any other time, when by the usage and course of business the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot be delivered, or if for any reason the consignee is not there to receive them, it becomes the duty of the company to store them safely, ready to be delivered, and to deliver them, when called for by the parties entitled to receive them; and that for the performance of these duties after the delivery of the goods from the cars, the company is liable as a warehouseman for hire. The company is thus held, after it has completed its transportation, to become a

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warehouseman, as a matter of law, and to have ceased to be a common carrier. This appearing to be the law in Massachusetts and recognized as such by its courts would be a bar to the plaintiffs' recovery if the question was before one of the tribunals of that State.

It is therefore for us to consider, to what extent, if any, the plaintiffs' remedy is affected by presenting his claim in a court of this State. None of the parties are residents here ; the defendants and all of the plaintiffs but one, reside in Boston, and have for many years. The plaintiffs carry on business there, and it is but fair to presume that they knew the practice of the railway companies there, in respect to closing their deliveries of freight from the platform, from half-past five o'clock on Saturday evening, until the following Monday morning, and storing it in the interval in their warehouses, and they must also be presumed to know the law of their residence in regard to such action. The plaintiffs' contract was not made with these defendants, but with the Norwich and New York Transportation Company, in connection with which and another company, the defendants participated in forming a connected line of transportation from New York to Boston. The plaintiffs could have selected a different time for the shipping and arrival of their goods, if they had seen fit, or they could have protected themselves by contract with the carrier, or by insurance against loss while in the freight-house. No objection is shown to have been made by them, to the placing of their goods in defendants' warehouse.

Under these circumstances the question arises, whether the remedy of the plaintiffs is not governed by the law of Massachusetts, the place where the contract was to be ultimately performed. The facts above referred to are not of a character to appeal very strongly to the interposition of a court in this State, to give the parties a remedy in conflict with the law of

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Massachusetts as defined by its courts. In this case, it must be deemed, that the plaintiff knew both the usage of the railway companies delivering freight in Boston, and the law of Massachusetts in respect to it, and while every feature of the case, and every fairly derived inference from it, is in conformity with the view that the original contract called for, and that the plaintiffs therein contemplated a delivery to their Boston firm, in accordance with the usage and law there prevailing, there is nothing that shows or expresses that the delivery was to be otherwise.

It is almost a matter of necessity, that the law at the place of the final performance of the carrier's contract should govern in regard to the delivery of goods. In the great commercial centers, where railway freights are delivered from the various States and provinces, it is obvious that there must be some uniform rule at the place of delivery governing such deliveries. To be guided by the various laws of the localities from whence the goods are sent, would be attended with great inconveniences, even if it was possible. The doctrine of the federal courts indicates that matters connected with the performance of a contract are to be regulated by the law prevailing at the place of performance (*Scudder v. Union Nat. Bank*, 1 *Otto* [91 *U. S.*] 406).

In this State the same principle is sustained, in *Whitford v. Panama Railroad Company* (23 *N. Y.* 474, 472), where, in affirming a decision of this court, the question is carefully considered.

The defendants should have judgment in their favor under the submission.

SEDGWICK and FREEDMAN, JJ., concurred.

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Statement of the Case.

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DUNCAN McCOLL, PLAINTIFF, v. THE WESTERN UNION TELEGRAPH COMPANY, DEFENDANT.

I. DAMAGES—MEASURE OF, FOR BREACH OF CONTRACT.

1. CONTEMPLATION OF PARTIES TO CONTRACT—RULE AS TO.

(a) Such damages only are recoverable as the parties either actually contemplated, or may be fairly supposed to have contemplated, as flowing from the breach.

1. REMOTENESS AS AFFECTING SUPPOSED CONTEMPLATION.

(a) Where the damage claimed is a loss of that which might have been obtained, depending on the contingency of a certain expected action of a third party in the event of the contract being carried out, it is too remote to be regarded as within the contemplation of the party breaking the contract.

II. APPLICATION OF RULE.—TELEGRAPHIC DESPATCH.

Despatch as follows: "*Can close Valkyria and Othere, 22, 20 net, Montreal. Ans. immediately.*"

HELD,

that commissions which the sender would have earned as a broker in effecting a charter of two vessels named Valkyria and Othere, if the message had been duly transmitted, were not damages either actually contemplated, or to be fairly supposed to have been contemplated by the defendant, and therefore not recoverable.

III. TELEGRAPH COMPANIES.

1. Damages for non-delivery not contemplated, are not recoverable.

*See Supra.*

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided March 8, 1879.*

At the trial a verdict for \$1,580.30 was directed for the plaintiff, and it was further directed that the exceptions taken by the defendant at the trial, be heard in the first instance at the general term.

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Statement of the Case.

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The action was brought to recover certain commissions, which the plaintiff claimed he would have earned, had the charters of vessels been concluded, which were lost from the defendant's failure to deliver in due time a telegraphic message.

In April, 1872, the plaintiff was a commission and shipping merchant, and broker, at the city of New York. James W. Carmichael & Co., correspondents of his at New Glasgow, Nova Scotia, had advised him that their two vessels, the *Valkyria* and *Othere*, were seeking charters at Montreal to carry cargoes of lumber thence to Montevideo or Buenos Ayres. The plaintiff communicated with his agents at Montreal, and on April 15, 1872, obtained from them offers for the charter of these vessels, which he thought James W. Carmichael & Co. would accept. On that day he dispatched a message to James W. Carmichael & Co., as follows :

"Can close *Valkyria* and *Othere* twenty-two, twenty net Montreal. Ans. immediately." At the same time the plaintiff paid defendant the cost of transmission, \$2.05.

The telegram was sent to Boston, on its way to New Glasgow, but was not sent forward beyond Boston. The plaintiff did not hear anything of it until April 25, 1872, when letters referring to it had been sent by the plaintiff to James W. Carmichael & Co., and their replies received by him. The telegram was not delivered at New Glasgow until the last-mentioned day. It was then of no use. One of the ships had been meanwhile chartered, and the charters which it referred to could no longer be obtained, and could not have been obtained after April 19, a date about half-way between the time of dispatching the message and the time of its delivery. Had the telegram gone forward in usual and ordinary course, the charters would have been accepted and concluded, and thereupon the plaintiff

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Plaintiff's points.

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would have earned, as his commissions for negotiating the same, the sum for which, with interest, the verdict hereinafter mentioned was directed.

*Thomas D. Hall*, attorney, and of counsel for plaintiff, on the questions considered by the court, argued :—

I. The plaintiff was entitled to recover the damages he had incurred by the failure of the company to forward and deliver his message. These damages, “flowing naturally and directly from the breach of the contract,” were the commissions he would have earned had the message gone forward; and which he lost because it was not sent. The message was sufficiently explicit. To any ordinary intelligence, upon a casual reading, it would convey the idea that it referred to pending negotiations of vessels which could be closed, and the words “twenty-two, twenty net,” and “answer immediately,” would denote that the subject matter, if not sufficiently disclosed, was important, and that the purpose of the message was urgent. Had the message been obscure, it was the defendant’s duty or business, by inquiry of the sender, to remove the obscurity and inform itself of its purport (*Rittenhouse v. Independent Line of Telegraph*, 44 *N. Y.* 263, 265). The rule of damages in cases like the present, is fully stated in the case in 41 *N. Y.* This rule has been followed in all subsequent cases; and even in cases like that in 45 *N. Y.*, where the telegraph company had the benefit of its discriminations, the authority of the case itself has been confirmed and upheld. In summing up the elements or basis of damages in such cases, the court says: “A more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention to the subject, and had been

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Defendant's points.

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fully informed of the facts'' (Leonard v. New York Telegraph Co., 41 *N. Y.* 544, 566, 567; De Rutte v. New York Telegraph Co., 1 *Daly*, 547).

*Porter, Lowrey, Soren & Stone*, attorneys, and *George N. Soren*, of counsel, for defendant, argued:—

I. The verdict for plaintiff cannot be sustained, because the damages awarded to him were not within the contemplation of the defendant when it made the contract. The defendant was entitled to be tried on its contract, which was simply a contract to telegraph and deliver the mere text of the message. (1) The rule respecting contemplation of damages and the limits of recovery within the principle, is well presented in *Griffin v. Colver*, 16 *N. Y.* 491; *Baldwin v. United States Telegraph Co.*, 45 *N. Y.* 744, and cases cited; *Landsberger v. Telegraph Co.*, 32 *Barb.* 530; *British Columbia S. M. Co. v. Nettleship*, 3 *L. Rep. (C. P.)* 499; *Horne v. Midland R. Co.*, 7 *L. R. (C. P.)* 590; 8 *Id.* 131; *Cory v. Thames Iron Co.*, 3 *L. R. (Q. B.)* 190; *Hobbs v. London R. Co.*, 10 *Id.* 111; 11 *Eng. Rep.* 181; *Elbinger, &c. v. Armstrong*, 10 *Id.* 127; *Sumner v. Ford*, 1 *El. & El.* 616; *Simpson v. London and Northwestern R. R. Co.*, 16 *Eng. Rep.* 330. (2) The English cases above cited, hold strictly that contemplation means actual contemplation founded on knowledge; and they give no sanction to a doctrine of constructive contemplation, which is, of course, no contemplation at all. (3) These cases further hold, with respect to contemplation of damages, that even knowledge or notice, unless worked into his contract, will not suffice to charge a party (see *WILLES, J.*, in *British Columbia, &c. v. Nettleship*, *L. R. C. P.* 508, 509). (4) The principle of the rule cannot be better presented than in the decisions about messages in cipher (*Candee v. Western Union Telegraph Co.*, 34 *Wis.* 471 [17 *Am. Rep.* 452]; *Sanders v. Stuart*, 17

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*Eng. Rep.* 268). The ground of decision in favor of the telegrapher in these cases is, that it is impossible that he should have had knowledge or contemplation of the transactions involved in such messages, or of the consequences or damages that would follow his default in regard to them. (5) The principle obviously holds good and governs when the message, though not in actual cipher, is yet so obscure as to convey no sense, or no definite or fair explanation of the matter involved (see the remark of ALLEN, J. in Baldwin's case, 45 *N. Y.* p. 749, *Allen's cases*, p. 649, that such a message might as well be in cipher; opinion of DALY, F. J. [dissenting] in Bryant case, 1 *Daly*). (6) As there was nothing on the face of this message which disclosed the nature of the subject to which it referred, and especially nothing of the roundabout and remote grounds upon which the plaintiff founds his cause of action and deduces these damages, and no information about any of these things given to the defendant, there is no reason whatever which will uphold this recovery. The cases of Shields, Lane, Stevenson, Kinghorne, Landsberger, Baldwin, Candee, Dorgan, Beaupré, Gildersleeve, Behm, Hord and Barnesville Bank are all adverse to the plaintiff. (7) In the cases collected at the end of the "Abstract of Cases," where substantial damages have been allowed, it will be seen that in most of them—for example, in the cases of Parks, Hobson, Birney, Bryant, De Rutte, Wenger and Leonard—the dispatches had upon their face disclosed the nature and extent of the business involved. (8) But for the very reason that that feature characterized those cases, and is entirely wanting in this, those decisions cannot avail the plaintiff here. (9) As to the cases of True, Graham, Squire and Strasburger, if the rule laid down in the largest number of cases is sound—and the difference in facts being taken into account, as just observed, the cases cited under 7 do



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Defendant's points.

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not qualify their authority—then these cases last referred to deserve no respect. In those cases, as is said by the editor in 9 *Am. Rep.* 55, there could have been no more knowledge or contemplation of the nature or extent of the transaction than if the message had been written in cipher. (10) In the Sprague case, it must be assumed that the counsel fee was allowed, as being fairly within the scope of the information communicated to the company as to the pendency of the cause and the coming trial of it, and so naturally and directly incidental to those things. (11) The language employed in the case of Leonard v. Telegraph Co., 41 *N. Y.* 544, is to be read in the light of the facts before it. The message there was, "Send five thousand sacks of salt immediately." If, instead of this, the message had been "Send five immediately," it may be very safely doubted whether the court would have employed such language as it has used, at the close of the passage last quoted. But the message showing that the transaction related first to salt, then to a specified quantity of it, and then to an immediate shipment of that amount, the imputation of the facts, incidental to these known facts, is not an extravagant application of the well-settled rule, that the parties may be charged with such deductions as they may be fairly supposed to have made, if they had contemplated an actual breach of the contract and its natural consequences.

II. The rule illustrated by these cases, which requires the damages recoverable to have been within the actual contemplation of the parties, is to be strictly construed in favor of telegraph companies. (1) It is manifestly unsound, and as unjust, to regard the telegraph company as a party to the contracts or transactions which are the subject of the messages intrusted to it. The telegrapher is, in these cases, only a third person, not party, having to do with the transaction

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Defendant's points.

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between the sender and receiver only in an external and collateral way. In almost no case can it be fairly presumed to have such knowledge of the subject of a message as is possessed by the principals in the transaction to which it relates; but in most cases, as in this, it has no knowledge, and can have no actual or even presumed contemplation of anything to which the message refers. (2) Further, the telegraph company is not a voluntarily contracting party. By force of its public duty, it is compelled to do the service demanded of it, without interest in, or right to be informed of the nature of the transaction involved. As to its own service, the law sanctions a contracting under certain reasonable regulations, and the exemption of itself by special contract from damages beyond certain limits. Such a contract was made between these parties, on the terms of the blank in this case, and the rights of both parties here are to be ascertained by the terms of that contract, and not by those of plaintiff's transaction with third persons (*Breese v. United States Telegraph Co.*, 45 *Barb.* 274; S. C., 48 *N. Y.* 152; *Belger v. Dinsmore*, 51 *Id.* 166.)

III. The damages awarded in this case cannot be allowed, because they are too remote, and depend on contingencies which might or might not have happened in such way as to have yielded this commission to the plaintiff, if there had been no default by the defendant. (a) If the message had been received by Carmichael & Co., it is not certain, in a legal sense, that they would have accepted the offer. It is true they say, now, that they would have done so, but that has been held insufficient (*Kinghorne v. Montreal Telegraph Co.*, *Allen's Cases*, 14). (b) If they had sent an acceptance of the offer, that might not have reached the plaintiff in time to secure his parties. (c) If an acceptance had reached the plaintiff, it would not have concluded any contract with the proposed

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Opinion of the Court, by CURTIS, Ch. J.

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charterers. The evidence is that Carmichael & Co. "would have considered the charters closed on receiving a reply to that effect." But it does not appear that those offers would continue till all these transactions were completed. (*d*) But charters must have been actually closed before the commission could be earned. (*e*) This opens new contingencies, and leads out to that remoteness which the law will not favor. (*f*) And especially should it be noticed in this case, that this remoteness and thin-spun contingency lead very far away from that which was communicated to defendant, to wit, the few incoherent words forming the message.

BY THE COURT.—CURTIS, Ch. J.—The defendant urges, that the verdict for the plaintiff cannot be sustained, because the damages awarded to him were not within the contemplation of the defendant when it made the contract, and that this case is governed by what was held in *Baldwin v. United States Telegraph Co.* (45 *N. Y.* 744). In the present case, the text of the message which the defendant failed to transmit until after a delay of several days, indicates upon its face no occasion for special care or the involving of the chartering of two vessels. There was no notice or information of any fact given to the defendant or contained in the message itself, indicating its importance or that special damages would result from any neglect. However strongly the plaintiff may have felt assured, acting as a broker in the matter, that the offer telegraphed to his principals would be accepted, and that he would get his five per cent. commission, yet there is nothing in the case that places these contingencies, in themselves uncertain and remote, within the contemplation of the defendant. It is true, the plaintiff's principals might have accepted the offer, and paid the plaintiff the commissions, and their evidence is, that

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Statement of the Case.

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they would have accepted it, if it had not been delayed by the neglect of the defendant, in failing to forward it immediately.

The claim of the plaintiff is for a special and contingent loss, and not for such a loss as was the natural and necessary consequence of the defendant's neglect, or, such as from the surrounding circumstances, could even be inferred by the defendant.

The decision in *Baldwin v. United States Telegraph Co.* (45 N. Y. 744), that, where a special purpose is intended by one party and is unknown to the other, and does not appear by the message itself, in the assessment of damages, such special purpose cannot be taken into consideration, but that the damages must be limited to those resulting from the ordinary and obvious purpose of the contract, governs the case under consideration.

There should be a new trial, unless the plaintiff reduces his verdict to \$2.05, the sum paid defendant to transmit the message, with interest from April 15, 1872.

SEDGWICK and FREEDMAN, JJ.

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APOLLONIE MUNDORFF, PLAINTIFF, v. JOSEPH  
WANGLER, AS EXECUTOR, &C., OF JAMES MOORE,  
DECEASED, DEFENDANT.

I. ADMINISTRATOR'S BONDS.

1. *Action against executor of surety for a breach of the bond, by the omission of the administrator to obey a decree for payment.*

(a) PRIMA FACIE CASE FOR PLAINTIFF, WHAT ESTABLISHES.

1. The decree directing the payment and stating facts sufficient to show that the surrogate was proceeding within his

## Statement of the Case.

jurisdiction, the petition for the decree, and the citation issued thereon, and the bond, having been read in evidence; and it having been proved that the administrator had omitted to perform the decree, that the surrogate's certificate under the decree had been duly docketed, that execution had been duly issued and returned unsatisfied, and that the surrogate had assigned the bond,

HELD,

that plaintiff had made out a case which required the direction of a verdict in his favor.

1. *Unnecessary proof*.—Proof of proceedings anterior to petition (other than the bond) is in such case unnecessary.

1. *Exceptions to unnecessary proof*.—Even if good, not cause for reversal.

(b) DEATH OF THE PRINCIPAL IN THE BOND.

1. *Evidence* of, as against the surety and his executor, *sufficient to establish the jurisdictional fact of death*.

1. The admission of the surety, and the fact that he acted and led others to act as if the death had occurred, is sufficient.

(c) BOND APPROVED OF BY SURROGATE.

1. *Not necessary*, to render it obligatory on the surety.

1. It is required for the benefit of creditors and distributees, who may waive it.

(d) DEMAND FOR PAYMENT OF DECREE.

1. *Not necessary*.

(e) SURETIES' DEATH, DEFAULTS AFTER.

1. *Sureties are liable for*.

(f) DECREE.—ERROR IN AMOUNT DIRECTED TO BE PAID, EFFECT OF.

1. Will not preclude a recovery for the correct amount.

II. SURROGATE'S DECREE FOR PAYMENT.

1. VOID OR INOPERATIVE, NOT RENDERED SO BY.

1. *Error* in amount directed to be paid.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided March 3, 1879.*

Exceptions ordered to be heard in the first instance at general term, the court having directed a verdict for plaintiff. The facts sufficiently appear in the opinion.

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Plaintiff's points.

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*Hall & McMahon*, attorneys, and *Elial F. Hall*, of counsel, for plaintiff, on the questions considered by the court, argued:—I. A formal order of approval is not required by the law or the practice; the approval is sufficiently shown by the acceptance of the bond, the filing of it, and the issuing of the letters. If the surrogate did not perform his duty in this particular, the *onus* was upon the defendant to show it (*Mandeville v. Reynolds*, 68 *N. Y.* 534; *Dayton v. Johnson*, 69 *Id.* 419). “It would be strange indeed if the sureties in an administration bond, after enabling their principal to possess himself of the personal estate by its execution, should be permitted to avoid its obligation, upon the plea that the officer granting the letters and receiving the bond had no jurisdiction of the subject matter. The execution of the bond precludes both principals and sureties from gainsaying the surrogate’s jurisdiction in any proceedings for the assets which the appointment and bond have enabled the principal to receive” (*People v. Falconer*, 2 *Sandf.* 83, approved in *Fake v. Whipple*, 39 *N. Y.* 394).

II. The objection that there was nothing on the face of the decree for payment, to show that the surrogate had acquired any jurisdiction, was unfounded and false. The recitals in the decree show the application of the plaintiff to the surrogate, the issuing of a citation to the administrator, and his appearance before the surrogate by his attorneys, Cornell, McCullough & McDonald, in obedience to the citation. “The recitals in a surrogate’s decree, which are full as to all jurisdictional matters, are *prima facie* evidence of its validity when the question arises in a collateral matter” (*Rowe v. Parsons*, 6 *Hun*, 338; *Dayton v. Johnson*, 69 *N. Y.* 425). “In the absence of fraud or collusion between the executor and the legatee, a decree of the surrogate directing payment to such legatee, is conclusive upon the sureties on the executor’s bond,

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Plaintiff's points.

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and cannot be impeached in a collateral proceeding" (Schofield v. Churchill, Court of Appeals, February 19, 1878; from 6 *N. Y. Weekly Dig.* 195).

III. The proceedings upon the surrogate's decree, the making and filing of the certificate of the decree, the docketing of the certificate, the issuing of the execution thereon and the return of the same unsatisfied, the petition for assignment of the bond, and the order assigning the bond, were all perfectly regular, and in strict accordance with sections 63, 64 and 65, of chapter 460 of the laws of 1837, as amended by chapter 104 of the laws of 1844 (4 *Edmonds' Statutes*, 498). To obviate all questions as to the proper county, and following the precedent laid down in *Rowe v. Parsons*, (6 *Hun*, 338), a certificate was also filed and docketed in Kings county, and execution issued there. These statutory proceedings were all that was necessary to make the cause of action on the bond complete and perfect. "A demand, previous to the commencement of the suit, of the money directed by the decree to be paid, was not necessary. The statute does not make such a demand a condition precedent to the right to sue the bond of the administratrix" (*People v. Rowland*, 5 *Barb.* 453).

IV. The surety is liable for defaults after his death. There is no analogy between a mercantile guaranty, revocable upon notice, and terminable, as has been held, by the death of the guarantor (except as to liabilities which accrued before his death), such as that in *Harris v. Fawcett* (15 *L. R. Eq. Cas.* 311), cited at the trial herein, and an administrator's bond, in which the sureties, in express terms, "bind ourselves, our, and each of our heirs, executors and administrators." Furthermore, the suretyship in this case is not terminable upon notice, at the will of the surety, but only upon the exercise of the judicial dis-

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Defendant's points.

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cretion of the surrogate, and after new sureties have qualified to his satisfaction.

V. In the hurry of computing the interest at the close of the trial, it was computed for two or three hundred dollars too much. We consent that the error be corrected at the general term and the verdict modified accordingly.

A. C. Anderson, attorney, and John S. Lawrence, of counsel, for defendant, on the questions considered by the court, argued :—I. The justice erred in allowing the certified copy of the inventory to be introduced in evidence. There is no provision of law authorizing any copy of such a paper to be read in evidence. The original inventory is filed in the office of the surrogate, and was the only evidence of any appraisement that was admissible. The surrogate's court being a court of limited jurisdiction, its certificates are not entitled to any credit, except when made pursuant to some statutory authority (*People v. Barnes*, 12 *Wend.* 492; *Stilwell v. Carpenter*, 2 *Abb. New Cas.* 268; *Matter of Watson v. Nelson*, 69 *N. Y.* 536).

II. The bond was improperly received in evidence, and the exception thereto was well taken. (a) No approval is shown, either by any indorsement or writing of the surrogate upon the bond, or by any record, such as an order directing the bond to be taken with the persons named therein as sureties. (b) The approval of a judge or any judicial officer can only be shown in the manner suggested above. Even though the surrogate may have reached such approval in his mind, there should be evidence from which that fact could be determined (*Burns v. Robinson*, 1 *Code R.* 62; *Seaman v. Ward*, 1 *Hilt.* 52; *Stephens v. Santee*, 51 *Barb.* 532). (c) There is no presumption that the bond was approved (*People v. Barnes*, *supra*). (d) If there could be such presumption, it must be overcome when



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Defendant's points.

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the bond being produced there is no approval on it. (e) If the surrogate had approved it, he is still alive, and could have been examined and the fact shown, if it was a fact. (f) The sureties had a right to know if they were accepted. How could they know, if there was no record? (g) There is no order directing the bond to be filed. There is no file mark, nor any other evidence upon the bond that it was ever filed. The only evidence given was, that it was in a book in the surrogate's office. The letters do not show that any bond was given at all.

III. The letters of administration upon the estate of John Mundorff were not properly shown. The original should have been produced, and the copy or record in the surrogate's office was improperly admitted in evidence.

IV. All the following papers, which were offered and received in evidence under defendant's objection, which papers purport to have been issued or used in and about certain proceedings in the surrogate's court, in the matter of the estate of John Mundorff, were improperly admitted. They are: Exhibit 1, Certified copy of letters of administration; Exhibit 2, Certified copy of inventory, copy letters of administration; Exhibit 9, Certified copy surrogate's decree; Exhibit 16, Petition of plaintiff for assignment of bond; Exhibit 17, Order assigning bond; Exhibit 19, Petition of plaintiff as a creditor; Exhibit 20, Citation for administrator to show cause; Exhibit 21, Consent to adjourn the proceedings with order for payment; Exhibit 22, Decree of surrogate of May 31, 1876; Exhibit 12, Execution to sheriff of New York; Exhibit 13, Certificate of clerk of Kings county, of copy decree; Exhibit 14, Transcript of judgment of Kings county; Exhibit 15, Execution to sheriff of Kings county. Each and all of these papers were objected to by the defendant, and received under his exception. 1. The surrogate had

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Defendant's points.

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no jurisdiction to issue until a bond had been given and approved. 2. That certified copies could not be put in evidence. 3. The surrogate's court being a court of limited jurisdiction, jurisdiction must be shown. There was nothing to show jurisdiction. 4. That the surrogate never approved any bond. 5. That they were for a greater amount than appeared to be due. 6. The decree of the surrogate, May 31, 1876, states that the plaintiff is entitled to \$7,996.99, and interest on that amount from October 20, 1875, amounting to \$340.53, which is \$600 too much, besides the interest on said \$600; and orders that the administrator pay that amount, viz., \$8,337.52, for which excessive amount the transcripts and executions were issued. (a) There is no proof that John Mundorff died, or that any petition was ever presented to the surrogate for the appointment of an administrator. These proceedings were jurisdictional, and as the surrogate's court is of limited jurisdiction, they should have been shown before the bond, or letters of administration, could be read in evidence.

V. So also the papers called the judgment roll, were improperly admitted, as they did not constitute a judgment; and also the reports of Ingraham and Kurtzman were improperly admitted.

VI. The plaintiff based her right to take proceedings against the administrator upon this so-called judgment, and in her petition to the surrogate, stated that she had recovered a judgment against said administrator for \$7,996.99. This amount was \$600 in excess of what she was entitled to receive, as shown by the so-called judgment itself, and the decree of the surrogate was made on her claim for the exaggerated amount and interest on that amount. The administrator was not indebted in the amount claimed, and the decree of the surrogate could not bind his sureties, for the reason that it was founded on a demand for more

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Defendant's points.

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than was actually due. A decree for default in complying with such demand, would not form the basis of a right of action against the surety. His rights are "*strictissimi juris*."

VII. It was also necessary for the plaintiff to show, before she could maintain the action, that a demand had been made upon Jacob Mundorff for the payment of the money required by the decree, and an omission of the administrator to comply with the decree (*People v. Barnes*, 12 *Wend.* 492; *Brewster v. Baldi*, 9 *Jones & Spencer*, 63). (a) But even if such demand had been proven in this case, it would not have availed the plaintiff, for the reason that the decree was, confessedly, for more than she was entitled, and a failure to pay that amount would not create such a default as would make the surety liable. (b) The administrator was not bound to pay the amount directed by the decree, for the plaintiff shows that it directed the payment of \$600 too much, with interest thereon. (c) "The sureties can only be made liable for the disobedience of the administrator to lawful orders of the surrogate" (*Annett v. Kerr*, Opinion of ROBERTSON, Ch. J., 28 *How. Pr.* 329). (d) No demand is shown to have been made upon Mundorff, the administrator, for the amount of money in which he is now alleged to be in default, although this suit is to recover for his supposed disobedience of a decree of the surrogate to pay that amount. Nor can it be claimed that the sheriff's proceedings upon the execution upon the surrogate's decree constituted a proper demand, because if there was no valid decree there could be no valid execution, and because demand for satisfaction of an execution for \$600 more than was unpaid, as plaintiff himself has proven, besides interest on such erroneous amount, cannot be a demand for some other amount which may be the proper amount.

VIII. The alleged default by Jacob Mundorff,

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Defendant's points.

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which is the basis of this action, occurred, if at all, in 1876, six years after the death of James Moore (the defendant's testator), and upon the death of Moore his liability as surety terminated, and for defaults occurring thereafter his estate, or the defendant as his executor, cannot be made liable. Moore was only a surety—sureties are always favored. The contract is one of beneficence, not of mutual interest. 1. The rule stated by Williams, is that, "If a man enters into a continuing guaranty and dies, his executor, it has been thought, is not liable upon it for advances made after the testator's death, which operates as a revocation" (3 *Williams on Executors*, 7 ed. 1869). "The death of the surety is perhaps a revocation of the guaranty" (*De Colyer on Guarantees, &c.*, Amer. ed. 422). The rule is stated by Smith, in speaking of "Surety, how discharged:" "It is said by Mr. Starkie to have been decided that a continuing guaranty is countermandable by parol. And the executor, it seems, is not liable in respect of advances made after the testator's death, which operates as a revocation" (*Smith on Mercantile Law*, 286; *Hande v. Craighead*, 67 *N. Y.* 432). 2. The Revised Statutes, sections 66, 67, 68, 69, provide for a surety's procuring his release from responsibility for future acts of his principal, by compelling him to give a new surety in his place, or in default thereof procuring a revocation of his letters. 3. The liability of the sureties upon the bond must be considered as though the words of the statute in respect to the obligation, its effect and revocation, were contained in the bond itself. 4. This surety died in 1870; and of course, could not very well apply to be relieved from his liability, which did not occur until 1875. The defendant claims that death revokes the obligation of a surety on an administration bond. In all cases where liability is terminable by notice, the surety is discharged by death. It cannot be that in

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Opinion of the Court, by SEDGWICK, J.

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respect to a surety the liability is to be continued for acts which transpire long after the surety has passed out of existence (*Jordan, et al. v. Dobbins*, Administrator, 122 *Mass.* 168; *Harris v. Fawcett*, 15 *Law Rep. Eq. Cas.* 311; 8 *Affirmed Law Rep. Chan. App.* 866). 5. The defendant had no notice of any claim until June 15, 1877.

BY THE COURT.—SEDGWICK, J.—James Moore, the testator of defendants, and another, as sureties, with Jacob Mundorff, as principal, made their joint and several bond, upon condition “that if the above bounden Jacob Mundorff,” shall faithfully execute the trust reposed in him as administrator, &c., &c., of John Mundorff, late of the city of New York, deceased, and obey all orders of the surrogate of the county of New York, touching the administration of the estate committed to him, then this obligation to be void, &c.

In 1870, the surety, James Moore, died.

In 1876, an order was made by the surrogate, that Jacob Mundorff, the administrator, forthwith pay to the plaintiff in this action the sum of \$7,996.99, together with costs, amounting in all to \$8,337.52.

The bond, the original petition of plaintiff, citation, decree or order, were produced upon the trial, from the surrogate's office.

The recitals in the order stated facts sufficient to show that the surrogate was proceeding within his jurisdiction. It was proved that the administrator had “omitted” to perform the decree (§ 23, c. 320, *L.* 1830), that the surrogate's certificate under the decree was duly docketed by the clerk of the county, that execution was duly issued and returned unsatisfied, and that the surrogate had assigned the bond given by the administrator (2 *Edm. R. S.* §§ 63, 64, 65, p. 498). The plaintiff therefore proved a breach of the condition that the administrator would obey all orders of the surro-

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gate, and a due assignment of the bond. This was enough to sustain the action, and required that the judge should direct a verdict for the plaintiff (*Brewster v. Balch*, 41 *N. Y. Super. Ct.* 69; *Dayton v. Johnson*, 69 *N. Y.* 419).

The plaintiff upon the trial unnecessarily proceeded to establish the validity of the claim made in the petition, by producing records tending to prove that the plaintiff had procured judgment against the administrator, and to re-enforce the presumption of jurisdiction, by giving evidence of the filing of inventory, &c. Many objections were taken on the trial to the proofs here alluded to. It is not profitable to notice them all in detail, inasmuch as if the matters were all out of the case, the court would have been bound to make the direction he did.

It is specially objected, that it did not appear that John Mundorff had died, nor therefore that the surrogate had jurisdiction of the administration of his estate. If there were not a presumption that he had died, it would be sufficient proof by admission of defendant's testator, that he acted and led others to act as if the death had occurred.

It is further argued that the obligation of the bond is not shown, until it is also proved that the surrogate, as directed by statute, approved it, and there was no such proof. The provision as to approval was not made for the benefit or protection of the administrator or sureties, but of creditors and distributees. If the latter do not require it, but waive their right or omit to object, the former cannot rest upon what is in the nature of an objection to their own acts.

It appeared that the order of the surrogate directed the payment of an amount greater than was really due to the petitioner, and in fact the order followed the judgment that had been obtained against the administrator. The plaintiff did not ask that the decree be

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Opinion of the Court, by SEDGWICK, J.

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enforced as to the error, but asked that a proper deduction be made. Indeed, the plaintiff, recognizing the error, had before trial acquiesced by stipulation, in a proper reduction of the judgment. Strictly, the decree of the surrogate was a final adjudication as to the amount of the judgment. It proceeded upon an allegation of the petition, that a judgment had been obtained, and an adjudication as to the existence and amount of the judgment was directly involved in the proceeding. But under any circumstances, it would not be proper to consider the decree void or inoperative, for such an error. If all the proceedings were taken together, they furnished a correction of what was an error of computation, and it could be deemed corrected.

It is objected that a demand for the payment of the decree should have been made upon the administrator. This was not necessary, for an omission by the administrator to perform the decree rendered the surety liable, by the act of 1830 (c. 320, § 23), and by section 65, chapter 460, *Laws of 1837*, the return of the execution unsatisfied gives the creditor a right to an assignment of the bond.

I do not see any ground for the proposition that the surety's liability upon the bond did not extend to defaults after his death. It was not revocable at his will; the intent of the contract covered defaults after death, not only because of the nature of the subject matter, but because also he expressly bound his executors and administrators.

There should be a correction of the error of calculation in the amount of the verdict, viz., \$200.

The exceptions of defendants are overruled, and judgment for plaintiff on the direction of the court, is ordered, with costs to plaintiff, but such costs are to abide the future direction of the court, at special term, as to the costs of the action.

FREEDMAN, J., concurred.

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Statement of the Case.

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JOHN P. BRANCH AND OTHERS, PLAINTIFFS AND  
RESPONDENTS, v. LAZARUS LEVY AND SIMON  
BORG, DEFENDANTS AND APPELLANTS.

I. TRIAL, CONDUCT OF.

1. JURY, RIGHT TO JUDGE OF CHARACTER OF TRANSACTION.

(a) FICTION. The perception of a jury may ascertain from the character and make-up of a fiction, what real event the fiction was meant to hide.

2. CHARGE CURING ERROR IN RECEPTION OF INCOMPETENT TESTIMONY; WHEN NOT.

(a) AGENT, LETTERS BY ONE CLAIMED TO BE.

1. An error in reception for the purpose of proving agency of such letters written after the close of the transaction in question will not, in a case where the evidence as to the fact of agency is nearly balanced, be cured by a charge that such letters were not evidence, for the reason that if the writer had in fact been an agent, his power to bind the defendants by his declaration ceased upon his making the agreement.

1. *This, although such letters were properly used on the cross-examination of the alleged agent, to affect his credibility or contradict him.*

II. APPEAL.

1. Error in reception of incompetent evidence not cause for reversal.

(a) *Rule*, that when such error could not possibly have worked injury, there is no cause for reversal, *not applicable to the case at bar.*

Before SEDGWICK and FREEDMAN, JJ.

*Decided March 8, 1879.*

Appeal from judgment entered on verdict for plaintiff and from order denying motion for new trial, made at special term upon the case and exceptions.

The action was for damages from the breach by de-



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Statement of the Case.

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fendants of a contract alleged to have been made between them, acting by one Harrison, as their agent or broker, and the plaintiffs, for the sale and delivery to the latter of coupons taken from bonds of a railroad company, to the amount of \$4,950. The main defense was that Harrison was not defendants' agent.

Both Harrison and the defendants resided in New York. The plaintiffs did business in Richmond, Virginia. The coupons were the property of defendants, and were at the Raleigh National Bank, in Raleigh, North Carolina. In a preliminary correspondence Harrison stated to plaintiffs that he had the coupons, and offered them to plaintiffs. In one letter he wrote, "They are all right, A No. 1 party guarantee. 80 is bid for them here. It is no use to bid less than 87. . . . If you want the coupons, or if you bid 87, I may get them and you will be satisfied."

Harrison telegraphed that he would sell the coupons at 87, delivered in New York. The plaintiffs telegraphed in answer, they would buy the coupons delivered in Richmond. Harrison closed with this, April 19, 1877. On the same day Harrison wrote to plaintiffs that he had received the last telegram and accepted, and continued: "The coupons will be delivered to you, by the First National Bank, Richmond, in a day or two, you paying the amount as agreed. The coupons couldn't have been had to-morrow, as I had written yesterday by mail instructing my lawyer to put them in immediate train for proof, &c. They are all right and you have a good bargain, only the party here didn't want to be bothered with the form of suit, which was offered to be done promptly and cheaply."

On April 21, 1877, the plaintiffs wrote to Harrison. Among other things: "We understand your seller is both responsible and reliable, and guarantees the coupons."

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On April 19, the defendants telegraphed the Raleigh Bank, that had the coupons, to send them to the First National Bank of Richmond, and also wrote to the First National Bank: "We have this day instructed the Raleigh National Bank to ship you \$4,950 Coups., which you are to deliver to Messrs. Branch & Co. of your city, upon payment to you at 87 cents on the dollar . . . . and remit us draft for proceeds upon this city."

The coupons were not at any time sent by the Raleigh Bank, or delivered to the plaintiffs.

The plaintiffs offered in evidence letters of Harrison that were dated and sent after April 19, in which he declared that in the transaction he had not acted as principal but only as broker. He did not give the name of his alleged principal.

To the admission of these last letters the defendants objected, on the ground that they formed a personal correspondence between Harrison and plaintiffs, subsequent to the contract, and were, therefore, not binding on defendants. The objection being overruled the defendants excepted.

On this proof as to agency, the plaintiff rested.

The defendants in their case examined Harrison as a witness. He testified that he did not act as broker for defendants, but bought the coupons of them at 83 cents, and requested the defendants to deliver them to the plaintiffs in Richmond, and to receive from them the amount agreed to be paid to Harrison. One of the defendants testified to the same effect. Both of the witnesses testified that on May 15, 1877, \$150 was paid by defendants to Harrison, in settlement of Harrison's claim as buyer against them as sellers of the coupons.

The court, in charging the jury, instructed them to find for the plaintiffs if they were satisfied by the letters of the defendants that Harrison acted as broker,

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Appellants' points.

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and asking them if these letters were consistent with the transaction between the defendants and Harrison being a sale and purchase of the coupons.

At the end of the charge the defendants' counsel requested the judge to instruct the jury to disregard all of the letters of Mr. Harrison, written to the plaintiffs subsequent to the transactions of April 19, 1877, and the court so charged.

The jury found a verdict for plaintiff. Judgment thereon has been entered. There was a motion for a new trial made on a case and exceptions, at special term. The motion was denied.

*Burton N. Harrison*, attorney, and of counsel, for appellants, among other things, urged:—I. The appeal from the order brings the whole case before the general term, which must now examine the case at large and decide it on the law and the merits as shown by the pleadings, the testimony, and the charge; and if it now appears that an injustice has been done, that the verdict is against the evidence, or is upon insufficient evidence, or is for excessive damages, or is otherwise objectionable, the verdict must be set aside and a new trial ordered, even though there may have been no exceptions or request to charge which presented the objections to the court on the trial (*Luddington v. Miller*, 36 *Super. Ct.* 7; *Macy v. Wheeler*, 30 *N. Y.* 237; *Lennox v. Hoppock*, 1 *Sweeny*, 469). The whole charge is now open to examination by the general term on the appeal from the special term order; and whether any particular part of the charge was excepted to or not on the trial, the inquiry here is whether it satisfactorily appears that an injustice has been done to the defendant by what now appears to have been a misdirection of the court on the trial (*Keyes v. Devlin*, 3 *E. D. Smith*, 523). So far as the court charged the jury that the question was one of fact for them to deter-

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Respondents' points.

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mine, whether the defendants entered into the bargain with the plaintiffs, and then failed to comply with it; that the vital question for their consideration was whether the defendants actually entered into the contract through the broker with the plaintiffs; that, if the jury deemed the coupons were sold by defendants to the plaintiffs, they must find for the plaintiffs. Here was a misdirection, which was calculated to mislead the jury, and for which a new trial should be granted (*Castanos v. Ritter*, 3 *Duer*, 370). This, under above cases, although there was no exception.

II. The letters written by Harrison to plaintiffs after the transaction, were not evidence against these defendants, and should never have been admitted when defendants objected to them as they did. And after admitting them in evidence, and allowing counsel to use them before the jury as the only material he had on which to sum up for the plaintiffs, the judge himself finally conceded that they had no relevancy in the case and directed the jury (but too late) to disregard all of them.

*Grimball & Tunstall*, attorneys, and of counsel, for respondents, among other things, urged:—I. As to the letters written by Harrison prior to, and also subsequent to April 19, 1877, they constituted the *res gestæ*. "These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact" (1 *Greenl. Ev.* § 108; *Laning v. N. Y. C. R. R. Co.*, 49 *N. Y.* 538; *Roulston v. Roulston*, 64 *Id.* 654). And the letters of the broker Harrison were made competent for the purpose of cross-examination, to contradict him and to show he falsified. It is well settled that if in the course of the trial evidence becomes competent, a new trial will not be granted, because admitted prior to that time. Every one of these letters and telegrams had

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Opinion of the Court, by SEDGWICK, J.

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been called for by the defendant's fourth cross-interrogatory to the witness Branch, who was required by the defendants "to produce and attach to his deposition all the letters and telegrams" of the broker Harrison. They were, therefore, made evidence by the defendants, even if they were not competent themselves. By the Code (§ 911) objections may be made to testimony taken on commission which might be taken if the witness were personally examined, and those only. Now, if on cross-examination a witness is forced to produce papers by the adverse party, the cross-examiner cannot object to their admission. In the present case, they were caused to be attached to, and thus made a part of, the deposition. They were not only identified but were made evidence. Depositions taken at the instance of one party may be read on the trial by the other (*Weber v. Kingsland*, 8 *Bosw.* 415, 439; see *Barry v. Galvin*, 37 *How.* 313; *Jordan v. Jordan*, 3 *Supm. Ct. (T. & C.)* 269; *Railway Passengers' Assurance Co. v. Warner*, 1 *Id.* 21; *Commercial Bank v. Bank of State of N. Y.*, 4 *Hill*, 519). The cross-examiner could not even withdraw his cross-interrogatory without consent—*a fortiori*, when he did not desire to do so, must the evidence adduced by it be made evidence for both sides (*Union Bank of Sandusky v. Torrey*, 5 *Duer*, 627). Directly in point is *Marshal v. Roberts* (10 *Hun*, 463).

BY THE COURT.—SEDGWICK, J.—I am inclined to think that there was sufficient testimony to take the case to the jury, on the issue of whether Harrison was defendants' agent, in making the agreement with plaintiffs. The examining of Harrison and one of the defendants, as to the alleged sale and purchase of the coupons between them, would prevent the case being taken from the jury. The jury's scrutiny of the testimony of these witnesses, and finding that the partic-

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ular account given by them was not correct, would lead not only to a discrediting of the witnesses and a rejection of their testimony, but as against the defendants, one of them being examined, to a possible conclusion that there was nothing to be opposed to the claim that Harrison did act as broker. The perception of a jury may ascertain from the character and make-up of a fiction, what real event the fiction was meant to hide.

In other respects, the case was not a strong one for the plaintiffs. There were, if any, but two considerations that threw the balance in plaintiffs' favor. The first grew out of defendants' letters to the Raleigh bank, instructing them to send the coupons to the Richmond bank, and instructing the latter to deliver them up to the plaintiffs on payment of an amount at 87 cents on the dollar. Harrison had in a letter to the plaintiffs named the Richmond bank as the place of delivery. The second grew out of Harrison's receiving \$150 from defendants in settlement of what they alleged to be the purchase of the coupons by him of them. Neither of these was conclusive against the defendants. The coupons were in Raleigh. If Harrison had bought them in New York of the defendants and sold them to the plaintiffs to be delivered in Richmond, it was not unusual or improbable that, to avoid a formal delivery to Harrison and by his verbal request, the defendants should deliver to the plaintiffs and write the letters in evidence to accomplish that delivery, agreeing with Harrison to pay him the difference, less expenses.

As to the settlement for \$150, though there was some testimony that if Harrison were entitled to the coupons, as buying them from defendants, his damages would have amounted to a greater sum, on the other hand, there was no evidence that his brokerage would have been that sum. The amount does not of itself appear to be equivalent to a brokerage. And the suggestion that the settlement was upon the basis

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of the profits that Harrison would have made by a sale to plaintiff at 87 is not without weight.

Down to Harrison's letters after April 19, the negotiations and agreement had not clearly disclosed that Harrison was acting for somebody else. The third person referred to by him was, on the face of the letters, a seller to him, and the guarantee referred to was such as had been made by the seller, on the sale to him. At least, such a construction is not entirely inadmissible.

Therefore, when the letters of Harrison, written after the agreement of April 19 was then consummated, were received as competent evidence against the defendants, it must have had some effect upon the jury, that Harrison declared that he was only a broker. In a case so nearly balanced this effect may have been decisive. Although these letters were properly used upon Harrison's cross-examination, they were then admissible only in respect of Harrison's credibility, or to contradict him by his own declarations. This does not reach the further use made of them as evidence in themselves against the defendants. And I think it appears that the instruction at the end of the charge that the letters were not evidence, for the reason that if Harrison had, in fact, been an agent, his power to bind the defendants by his declaration ceased upon his making the agreement, may not have led the jury to undo what had been done in their minds, upon the testimony contained in the letters.

For the reason given, I am of opinion there should be a new trial. The other exceptions were not valid, but need not be stated in particular.

The judgment, and the order denying the motion for a new trial made at special term on the case as settled, are reversed, and a new trial ordered, with costs of the appeals to appellant to abide the event of the action. On the appeals from the orders denying motion

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for new trial, one bill of costs with disbursements, if any, are to be taxed, as there has been but one argument.

FREEDMAN, J., concurred.

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AUGUSTE MENARD AND LENA S. MENARD,  
PLAINTIFFS AND RESPONDENTS, v. MARIETTA  
R. STEVENS, DEFENDANT AND APPELLANT.

I. APPEAL.

1. EVIDENCE INCOMPETENT, BUT NOT WORKING ANY  
INJURY.

(a) RULE, THAT ITS ADMISSION IS NOT CAUSE FOR REVERSAL,  
Applies

When the evidence is as to facts which, if not testified to,  
the *jury would know*, from an experience common to all,  
must have existed.

II. DAMAGES.—CONTRACT, BREACH OF.

1. PRIOR PROFITS, EVIDENCE OF, ADMISSIBLE.

(a) When by contract between S. and M. it was agreed that M.,  
for a certain specified period should occupy a certain part of a  
building of S., and carry on therein a certain business in con-  
nection with a certain other business carried on by S. in the  
rest of the house, and that M. should receive all the profits of  
his business:

*Held,*

In an action by M. against S. for a breach of the contract in  
ousting him from his part of the building, that evidence of  
the profits made by him prior to the breach was admissible  
on the subject of damages.

1. SUBSEQUENT PROFITS. The tendency of the evidence  
to form a basis for an improper allowance of subse-  
quent profits must be guarded against by the charge.

2. ELEMENTS OF DAMAGE IN ABOVE PUT CASE. The nature  
and extent of the business done before breach, the con-  
tingencies to which that business was subject, the ex-



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penses incurred, the profits made, and losses sustained, and the admissions made by M. in regard thereto are all to be considered in determining what the use and occupation of the demised premises in the condition in which they were at the time of the breach, including the furniture in them, would have been worth to M. for the purposes mentioned in the lease, for the time he was deprived of it by the unlawful acts of S.

## III. APPEAL.

## 1. CHARGE, REFUSAL TO.

- (a) A refusal to comply with a request to charge a *perfectly correct proposition* is not error, if it has no bearing on the issues involved.

Before CURTIS, Ch. J., and SEDGWICK, J.

*Decided March 8, 1879.*

Appeal from a judgment.

In May, 1876, an agreement in writing was made by the parties to this action, by which the plaintiff agreed for the term of three years to take charge of a kitchen and restaurant, in a house owned by the defendant; in consideration of which the defendant agreed to let the plaintiff occupy and use the kitchen, room for a restaurant and other rooms in the house, with the privilege to the plaintiff to keep for his own profit a first-class restaurant and dining-room, for the tenants of the house; the plaintiff was to keep the rooms used by him clean and in good order; to feed the employees of the house, to the number of eighteen, and was to supply the tenants of the house with first-class "French cooking, keeping the standard equal to that of all first-class hotels in the city." The defendant had the right to cancel the agreement by giving thirty days' notice to the plaintiff upon plaintiff's neglect or refusal to perform the agreement, "said neglect or refusal to be decided by arbitration." The agreement contained "the parties of the second part will pay

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no money rent for the rooms above mentioned, but in lieu thereof agree to feed all the employees of Mrs. Stevens, in the house ; the number of said employees not to exceed eighteen . . . the parties of the second part will pay for any (other?) rooms or apartments required or taken by them for their use and occupation, at a fair valuation." Mrs. Stevens agrees to lease said premises for a term of three years, if said conditions are complied with. The plaintiffs took possession, furnished certain of the rooms, and began to carry on a restaurant, and continued to carry it on until some time between January 29 and February 7, 1877, when they were forcibly ejected by the defendant.

The action was brought to recover damages for a breach of the contract.

The defendant claimed the restaurant was not kept as the agreement provided. The plaintiff insisted that it was. On the trial conflicting testimony was given. The defendant also claimed that upon the neglect of the plaintiff to keep the restaurant as agreed, she attempted to bring about an arbitration as to the neglect ; that plaintiff refused to arbitrate, and that she therefore gave more than thirty days' notice that she canceled the agreement for the neglect. The testimony on this point given on behalf of defendant was opposed by testimony on behalf of plaintiff.

On the trial, upon the subject of damages, the following questions were put, objections made, exceptions taken and answers given :

" As soon as I received this (being a note from Mrs. Stevens), I went to Mrs. Stevens, and she told me I have got to settle immediately or take my things out, or she would put them on the sidewalk ; then I moved out ; I took everything down to Waverly place ; I sold part and got part ; the gas fixtures I sold to Mr. Pan-coast.

" Q. What did you get for them ?

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“Objected to as incompetent on the question of damages. Objection overruled and exception taken.

“A. He gave me thirty per cent. of what I gave for them.

“Q. Now, in relation to the buffet?

“Defendant’s objection and exception covers all testimony on this point.

“A. I sold that back for \$60 ; it cost me \$150.

“Q. What was that lease worth at the time of this damage?

“Objected to as calling for an expression of opinion on the part of the witness, who is not shown to be an expert, and as otherwise incompetent. Objection overruled and exception.

“A. That lease I deemed it at \$15,000, for three years ; \$5,000 a year.

“Q. What profit did result from taking in \$3,000 a month?

“Objected to as incompetent. Objection overruled and exception taken.

“BY THE COURT :—The question is as to your profit?

“A. My profit was thirty per cent. at the time I made \$3,000 a month ; that is the way I based my \$15,000 ; I removed my things to Waverly place ; I am not there now ; Mr. Folmer has now the restaurant where I was before ; my wife came there nearly every day to look out for the linen ; I had everything in good order ; she took charge of everything.”

The judge, on the subject of damages, charged :

“Now, as to the measure of damages, I have to instruct you that you can allow nothing for losses sustained by plaintiffs in the re-sale of any of the property removed by them. That may have been their misfortune, but for that the defendant is not responsible. There was nothing that the defendant did which prevented the plaintiffs from using the property so

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removed by them elsewhere in similar enterprises. Other items of damage are claimed, but you must discard them all except the damage which necessarily flows from the breaking up of plaintiff's business before the time had arrived at which the defendant had a right to insist upon a discontinuance. The period of time for which plaintiffs may have a right to recover may, as I have already said, consist of only a few days, or it may consist of the whole unexpired term of the lease, according as a matter of fact you may find it. That is a question for you to determine. Whichever way you may determine it, in assessing the damages for that period, you have a right to consider the nature and extent of the business done by plaintiffs while they were there; the many contingencies to which that business was subject; the expenses incurred, the profits made, and the losses sustained; and also the admissions made by the plaintiffs in regard thereto; and upon all these matters you will have to determine what the use and occupation of the demised premises, in the condition which they then were, including the furniture in them, would have been worth to the plaintiffs for the purposes mentioned in the lease, for the time, be it short or long, they were deprived of it by the unlawful acts of the defendant, if they were so deprived.

“Prospective profits cannot be compensated for, they are too uncertain. You will, therefore, have to assess the damages according to the rule laid down by me, and in doing so you may, among other things, consider on one hand the offer made by plaintiffs to sell out to the defendant and also to another at a certain price, which appears in evidence, and on the other hand the circumstances and the necessity under which these offers were made. You may also consider any admission or admissions which you may find plaintiffs, or either of them, made in regard to the profitableness

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or unprofitableness of the business while it was carried on by them.

“And finally you will bear in mind that the right of plaintiffs to any damages, in case a notice of thirty days was given, depends entirely upon the question whether the plaintiffs fulfilled all the conditions of the agreement on their part.

“By taking a common sense view of all these matters, I have no doubt you will arrive at a proper conclusion. If, however, from the state of the evidence you should find yourselves unable to determine the damages to which plaintiffs may be entitled, you must give the plaintiffs at least nominal damages.

“In case you find for the plaintiffs in any sum whatever, you will also have to determine what damage, if any, the defendant sustained by reason of any breach of any of the conditions of the agreement to be performed by the plaintiffs, and then offset it against the amount to which the plaintiffs may be otherwise entitled. And in this connection you will bear in mind that the defendant claims that certain bills for fuel and gas were left unpaid. The plaintiffs on the other hand deny it. Between them you will have to determine how the fact was in that respect.”

Defendant's counsel excepted to that portion of the charge wherein the court says that the nature and character of the business which the plaintiffs had conducted may be taken into consideration by the jury, in estimating damages.

Also to that portion of the charge wherein the court says that the evidence is either conflicting or not clear, as to the fact of thirty days' notice having been given.

Also to that part of the charge wherein the court says that in estimating the damages, it may be for the whole unexpired term, if the plaintiffs complied with every undertaking in the agreement.

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Appellants' points.

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The jury thereupon rendered a verdict for the plaintiffs for the sum of \$5,000.

The defendant's counsel moved for a new trial upon the minutes, which motion was denied, and exception taken.

Judgment was thereupon entered on the verdict.

Defendant appeals from the judgment.

*John Berry*, attorney, and of counsel, for appellants, on the questions considered by the court, among other things, argued:—I. The agreement upon which this action is brought was a personal one, calling for the personal services of the plaintiff, of the character therein mentioned, and was not a lease, which could be sold by plaintiff to a third party, with the right to possession or enjoyment under it. It, therefore, had no value, disconnected with the personal services of plaintiff (*Jackson v. Delacroix*, 2 *Wend.* 433). The only occupation or use of the premises, under the agreement, was the personal occupation and use by the plaintiff for the sole purpose of properly performing the personal services required of him thereby. The defendant was not obliged to accept the occupation or services of another person, and any sale or other disposition of the plaintiff's right or interest under the agreement, or substitution of another's services, would have been a violation of its conditions, authorizing defendant to cancel the same. The learned judge, therefore, erred in his denial to charge the jury to this effect, as requested. It is reasonable to assume that this request to charge, made and denied in the presence and hearing of the jury, induced them to believe that there was to this agreement a salable value disconnected with the services of plaintiffs, such as would naturally attach to an ordinary lease, and this, no doubt, had a material influence upon their verdict, particularly in

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Appellants' points.

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connection with the charge of the learned judge, upon the question of damages, where he instructs the jury that in assessing damages they would have to determine "what the use and occupation of the demised premises would have been worth to the plaintiffs for the purposes mentioned in the lease, for the time the plaintiffs were deprived of it by the unlawful acts of the defendant;" and that the plaintiffs' right to recover might consist of the whole unexpired term of the lease.

II. There was error in the reception of incompetent evidence. The plaintiff was asked: "What was that lease worth at the time of this damage?" and under objection was allowed to answer: "That lease I deemed it at \$15,000 for three years; \$5,000 a year." This agreement not being in fact a lease, not having a value as a lease, for the reasons hereinabove stated, the question was improper upon the subject of damages. Even if the question had been proper, it had not been shown that the witness had a knowledge of the value of a lease of this character, or that he was competent to give an opinion upon the subject. That he was not competent is shown by his cross-examination, where he says that he had never kept a restaurant like this before. Again, the plaintiff was asked: "What profit did result from taking in \$3,000 a month?" and under objection he answered: "My profit was thirty per cent. at the time I made \$3,000 a month; that is the way I based my \$15,000." This was incompetent for the same reason, and for the further reason that it was evidence only of prospective profits, which is not the measure of damages, and for which there can be no recovery. Any future profits under this agreement were contingent and uncertain, and could not be estimated. It could not be assumed that these occupants of the house would continue to patronize this restaurant. They were under no obligation to do so, either

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Opinion of the Court, by SEDGWICK, J.

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to the plaintiff or to the defendant. The destruction of the building by fire or otherwise would have prevented future profits. The death of the plaintiffs would have done so. The increase in the cost of conducting the business might have materially impaired or destroyed the profit. Thus it will be seen that the only evidence upon the question of damages was that of future profits, uncertain and dependent upon innumerable contingencies, for which there can be no recovery (*Hamilton v. McPherson*, 28 *N. Y.* 72; *Giffin v. Colver*, 16 *Id.* 494). It is true that the learned judge said to the jury that prospective profits could not be compensated for, but there can be no doubt that in the absence of any other evidence on the question of damages, the jury were misled by its admission in connection with the instructions to them above mentioned, that "they were to determine what the use and occupation of the premises would have been worth during the unexpired term," and that their verdict was based upon this evidence (*Green v. Hudson R. R. Co.*, 32 *Barb.* 25; *Worrall v. Parmelee*, 1 *N. Y.* 519).

*John Langtree*, attorney, and of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—There was no motion to dismiss the complaint, on the ground that the testimony did not prove any cause of action, nor was there any request that the judge direct the jury to find for the defendant on the whole case, nor was there any motion for a new trial upon a case. A motion for new trial was made upon the minutes. It specified no ground, and the order denying it was not appealed from. We are, therefore, confined to an examination of the exceptions taken by the defendant.

The plaintiff, as witness for himself, was asked: "Tell us, in round numbers, about how much you ex-



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pended in fitting up and furnishing these apartments?" The ground of objection was stated, that under the agreement there is nothing requiring the plaintiff to furnish any particular amount. If the agreement called upon the plaintiff, as it clearly did, to furnish the rooms for a restaurant, he had the right to prove the facts connected with the furnishing, and was not shut off from this proof, because the agreement did not specify any particular sum he should expend. The cost of the articles was some evidence of the fitness of the furniture for the kind of restaurant that the agreement meant. The witness was also allowed to state the money he lost upon a sale of the furniture after the auction. This was objected to as incompetent on the question of damages. It may, perhaps, be that this testimony was not material in the case. It is evident, that, under the subsequent charge of the judge, that the jury must not include in the damage this loss, the proof could not have injured the defendant. There are often instances, when incompetent testimony may have the effect of so prepossessing the minds of jurors, that they will not be able to follow a direction of the judge to disregard it. The safe rule, therefore, is that all improper testimony is deemed to do injury until the contrary clearly appears. Here, however, the answer given stated facts, which, if not testified to, the jury would know, from an experience common to all, must have existed, when the furniture was sold after it was used.

There was an objection to the witness stating the value of what was called the lease. The ground was that the witness was not an expert, and the proposed testimony was otherwise incompetent. The answer given was apparently an opinion of the witness, and he had not been proved to be qualified to express an opinion. Another answer was given in immediate connection with the first, and the two, which should be taken

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together, show that the sum the witness named was the result of a calculation from the profits he had made before the alleged wrong. He said in the last answer: "My profit was thirty per cent. at the time I made \$3,000 a month; that is the way I based my \$15,000." As to the plaintiff's right (under the agreement, in substance, that he should have the profits of keeping a restaurant for the tenants of the house) to show what the profits had been before the eviction, there can hardly be a doubt. The damages for breaking up unlawfully a profitable business would be greater than for breaking up a business that had had no profit. The judge, by the charge, protected the defendant against a verdict for subsequent profits, in a way that she cannot complain of (*Bagley v. Smith*, 10 *N. Y.* 489; *Marquart v. La Farge*, 5 *Duer*, 559). The judge directed the jury explicitly not to give damages for any causes, specifying them, excepting the breaking up of plaintiff's business. He said, among things on this point: "Other items of damage are claimed, but you must discard them all, except the damage which necessarily flows from the breaking up of plaintiff's business, before the time had arrived at which the defendant had a right to insist upon a discontinuance."

The court properly excluded the question, "Did you hear any other person making complaint to him (the head waiter) at any time." The answer would have been hearsay.

At the end of the testimony, the defendant's counsel moved to dismiss as to the plaintiff Lena S. Menard. This was properly denied. She was jointly interested in the agreement. The counsel also moved for a dismissal of the complaint generally, on the ground that no damages recoverable in this action had been proved. If the proof as to loss of the business and other like proof were disregarded, clearly the plaintiff had shown

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Opinion of the Court, by SEDGWICK, J.

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some damage, if he were unlawfully evicted, as to which no question was addressed to the court on the trial.

There was a request by defendant's counsel to charge that the agreement was personal between the plaintiffs and defendants, one which called from them personal services and was not a lease in any such sense as that it could be sold, or that Mrs. Stevens was obliged to accept anybody who may have been appointed by Mr. Menard. If this be accurate, in all respects, the defendant was not injured by the court refusing to give to the jury a description which had no practical value in the case, and referred to matters not in issue before the jury. Whether it was a personal agreement or was a lease that could not have been sold, and whether Mrs. Stevens was obliged to accept some one named by Mr. Menard, did not affect the issue as to the wrong complained of.

The charge, that the jury in estimating the damage should consider the nature and character of the business which the plaintiffs had conducted, seems, as has been already said, to be correct.

The testimony, as given in the case, justified the court in telling the jury that the evidence as to the fact of thirty days' notice having been given was either conflicting or not clear.

I do not perceive any reason for not sustaining the charge, that if the plaintiff complied with every undertaking in the agreement, the damages might be for the whole unexpired term. The defendant had the right to cancel the agreement by thirty days' notice only in case the plaintiff failed in his performance. If he did not fail, and this was left to the jury, his interest was for more than thirty days, and was in the full time the agreement might last.

The judgment appealed from should be affirmed, with costs.

CURTIS, Ch. J., concurred.

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SPECIAL TERM, 1878.

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ABNER MILLS AND ABNER P. MILLS v. JAMES  
M. HICKS AND GEORGE BELL.

INCORPORATION OF COMPANIES FORMED TO NAVIGATE  
THE OCEAN BY STEAMSHIPS. STATUTE OF 1852 (2 R. S.  
6 ed. 718).

LIABILITY OF THE STOCKHOLDERS FOR THE DEBTS OF AN INCORPORATION OF THIS CHARACTER, WHEN THE WHOLE OF THE CAPITAL STOCK HAS NOT BEEN PAID, AND A CERTIFICATE FILED AS PROVIDED IN THE SAID ACT.—STATUTE OF LIMITATIONS.—WHEN DOES IT OPERATE UPON SUCH A CLAIM.

The liability of the stockholder, under such circumstances, is incurred the moment the contract of the creditor with the company is consummated (*Corning v. McCullough*, 1 N. Y. 47; *Aspinwall v. Sacchi*, 57 *Id.* 331).

In this case, the statute begins to run when the plaintiff has the right to bring his action under the clause of section 8, viz.: "And no suit shall be brought against any stockholder in such corporation, for any debt so contracted, until an execution shall have been returned unsatisfied in whole or in part." And in case of the sheriff's failure to return it (at the end of sixty days), then the return of it as procured by proceedings taken by the creditor within a reasonable time after the failure of the sheriff to return, shall be deemed the time referred to in the statute. The statute begins to run at the lapse of such reasonable time, without the creditor taking any proceedings to compel a return.

In this case, whether a reasonable time had elapsed is a question of law. No fact is stated to explain the execution not being returned for two years after it was issued, and no reason can be presumed for it. It must be held that a reasonable time did elapse without proceedings being taken by plaintiff.

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Opinion of SEDGWICK, J.

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Before SEDGWICK, J., at Special Term.

*Decided May 15, 1878.*

This action was commenced February 21, 1876.

The plaintiffs recovered a judgment against The New York Mail Steamship Company, February 10, 1868, upon a debt that became due in October, 1867, for \$2,100.35.

An execution issued on said judgment, February 11, 1868, which was not returned until March 1, 1870, and then returned unsatisfied.

During all this time defendants were the owners of 431 shares of the capital stock of said company. The capital stock of said company was never fully paid in, and a certificate of the same filed, in regard thereto, as required by the statute.

The complaint, after stating these facts, claimed that defendants were liable to pay said judgment. The answer set up the statute of limitations as a defense.

Plaintiffs demurred to this answer, and the demurrer was argued at special term.

*Pelton & Poucher*, for plaintiffs.

*Henry L. Vilas*, attorney for defendants, *James C. Spencer*, of counsel.

SEDGWICK, J.—As to the defense of the statute of limitations, I am inclined to think that it is equivalent to a general averment that the supposed cause of action did not accrue within six years before the commencement of the action. Of course, this defense is not demurrable, but I understand that the case is presented as if the plaintiff, making no objection to the answer pleading matters of evidence, submits the question on the demurrer, of whether the facts stated in the answer, and admitted by the complaint and

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demurrer, show that the action was not brought within six years after the right to bring it accrued. For this purpose a stipulation is handed in, that this action was begun February 21, 1876.

The question is the same as if, upon the trial, the facts admitted appeared in evidence, and no other facts, and the judgment of this court were asked thereon, as to the defense.

My opinion is that the statute begins to run when the plaintiff had the right to bring his action under the clause of section 8, viz.: "and no suit shall be brought against any stockholder in such corporation for any debt so contracted, until an execution shall have been returned unsatisfied in whole or in part."

There is no question in this case as to whether the plaintiff might have, under his right to issue an execution, of his own will, at any time within five years after judgment, brought his action upon the return of such execution unsatisfied. The statute requires that he shall have in fact issued the execution. In this case he did so on February 11, 1868, and it was in fact returned on March 1, 1870.

Now, what point of time was within the view of the statute? The intent evidently was that the execution should exhaust the company's property, in the first instance, so far as any possible legal use of the writ could be made by the sheriff. It could not have contemplated that the sheriff would fail in his legal duty to return the writ in sixty days, although it did not ignore the possibility of his not returning it then. And it must have intended that the plaintiff would, in his own interest, in case of the sheriff's failure to return, have compelled a return; 1st, to definitely ascertain his rights against the property of the corporation; 2d, as against a stockholder to get the right to begin an action under the statute now considered.

It could not have contemplated that the execution

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Opinion of SEDGWICK, J

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might remain in the hands of the sheriff for a long period of time after the end of sixty days, through which he would have no right to levy its amount upon property, while the creditor took no proceeding to secure a return. It supposes that the creditor will, within a reasonable time, proceed to secure the return.

The extrinsic circumstance of an execution returned unsatisfied, is a prerequisite to a right to sue. But it does not follow from that, that the statute meant that the plaintiff might allow an execution, after he had seen fit to issue it, to remain unreturned indefinitely. On such a point, the opinion of Judge DUER is pertinent, in *Lyle v. Murray* (4 *Sandf.* 595). He said: "Even where an agent, from the peculiar circumstances of his agency, is only bound to pay upon demand, it by no means follows that until a demand no cause of action accrues, so that the statute does not begin to run. It by no means follows that the principal, by omitting to make the necessary demand, may suspend the statute for an indefinite period. It is the duty, in all cases, of an agent who has collected money for his principal to give immediate notice of the fact, and when the principal has received such notice, he is bound to make the requisite demand within a reasonable time, and if he omits to do so, he puts the statute in motion, and when he suffers the term which it limits to expire, is concluded by his laches. This exact question was determined by the supreme court in *Stafford v. Richardson* (15 *Wend.* 305)."

The application of the statute of limitations is made, in many cases, to depend upon the nature of the relations between the parties (*Merritt v. Todd*, 23 *N. Y.* 34; *Payne v. Gardiner*, 29 *Id.* 146; *Wheeler v. Warner*, 47 *Id.* 519).

I am therefore of the opinion that the time referred to in the statute, for the accruing of the action, is the return of the execution at the end of sixty days, or in

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case of the sheriff's failure to return it, then the return of it, as procured by proceedings taken by creditor within a reasonable time after the failure of the sheriff to return. And that the statute begins to run, at the lapse of such reasonable time, without the creditor taking any proceedings to compel a return.

In this case, whether a reasonable time elapsed is a question of law. No fact is stated to explain the execution not being returned for two years after it was issued, and no reasons can be presumed for it. It must be held, that a reasonable time did elapse without proceedings being taken by plaintiff.

Judgment for defendant on demurrer.

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**FREDERICK BUTLER, ET AL., PLAINTIFFS, v.  
ABRAHAM H. FLANDERS, DEFENDANT.**

**COMMISSION TO TAKE TESTIMONY.—CROSS-EXAMINATION, RIGHT TO.**

It appears, upon the face of the commission, that the witness examined under it, on behalf of plaintiff, was, prior to his examination, furnished by plaintiff's attorney with copies of the interrogatories and cross-interrogatories to be administered to him. No prejudice is shown to have accrued to defendant therefrom, save what may be inferred from the receipt by the witness of both sets of interrogatories, nor any intention appear, on the part of plaintiff's counsel, to secure an unfair advantage over defendant.

*Held*, that the deposition should stand, and that the fact of the receipt of the interrogatories should only affect the credibility of the witness, and the weight of his testimony. *Also*, that defendant must have leave to frame and administer further cross-interrogatories, and that if he elect so to do, the commission must be returned at the sole expense of the plaintiffs.

The necessity and right to cross-examination considered, and the authorities reviewed.

Before FREEDMAN, J., at Special Term.

*Decided December 2, 1878.*



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Opinion of FREEDMAN, J.

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Motion by defendant to suppress deposition.

*James K. Hill*, for the motion.

*J. H. Dougherty*, in opposition.

FREEDMAN, J.—It appears, upon the face of the commission, that the witness examined under it on behalf of the plaintiffs was, prior to his examination, supplied by the counsel for the plaintiffs with copies of the interrogatories and cross-interrogatories to be administered to him. Whether they were sent to him directly or indirectly can make no difference, as long as they were actually furnished to him in advance of his examination. That they were so furnished is admitted by plaintiffs' counsel, in the affidavit submitted by him.

No prejudice is shown to have accrued to the defendant therefrom, except such as may be inferred from the bare fact of the receipt, by the witness, of both sets of interrogatories; and the question is, therefore, whether such fact alone calls for the suppression of the deposition.

When a witness has been examined in chief, the other party has a right to cross-examine him for the purpose of ascertaining and exhibiting the situation of the witness, with respect to the parties and to the subject of the litigation, his interest, his motives, his inclination, his prejudices, his means of obtaining a correct and certain knowledge of the facts to which he has borne testimony, the manner in which he has used those means, his powers of discernment, memory and description. Such cross-examination is one of the principal and most efficacious tests which the law has devised for the discovery of truth, and the right to its free and full exercise is deemed of such great importance, that if a witness dies after he has been examined

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Opinion of FREEDMAN, J.

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in chief, and before his cross-examination, his testimony is inadmissible (*Kissam v. Forrest*, 25 *Wend.* 651).

But such test is rendered almost, if not quite, useless if the witness can be posted by the party calling him, in advance, as to the entire range which the cross-examination is to take, and made thoroughly acquainted with the form, nature and purpose of every question intended to be put to him on the cross-examination.

To sanction such a practice would in many cases lead to the grossest abuse. The tribunal which is to pass upon the testimony of the witness is entitled to his independent recollection of the facts to which he may be able to testify, as such recollection may appear from the whole range of his examination; and this implies that the whole examination throughout must be fairly conducted. Each party is entitled, therefore, to freely and fully examine him without undue interference on the part of the other.

The statute authorizing the issuing of commissions to take the testimony of witnesses residing abroad is an innovation on the common law rules of evidence (*Jackson v. Hobby*, 20 *Johns.* 361), and hence the principle that its positive requirements must be strictly complied with has always been recognized and acted upon. But even beyond that, whenever undue means are employed to give shape or color to evidence taken upon commissions, says ALLEN, J., in *Commercial Bank of Penn. v. Union Bank of New York* (11 *N. Y.* 203), it will be proper, upon motion, to set aside the deposition and order the commission to be executed anew, or deprive the party thus abusing the process of the court of its benefit, as shall be deemed most fit.

So, where the taking of the deposition was suspended in consequence of the sickness of the witness, and subsequently the witness appeared again with his

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counsel, and the examination was commenced anew, and the witness read his answers to all the interrogatories, direct and cross, from a paper he brought, which had been prepared by himself and counsel and was in his counsel's handwriting, the deposition was, on motion, suppressed (*Creamer v. Jackson*, 4 *Abb. Pr.* 413).

Section 910 of the Code of Civil Procedure enumerates the cases in which the deposition may be suppressed, and any unfair or overreaching conduct on the part of the attorney for either party, to the prejudice of the adverse party, in the course of the proceedings, as well as fraud, is made a sufficient ground for the suppression of the deposition.

Upon the whole case, however, as it appears before me, I may well hesitate to suppress the deposition altogether. No special prejudice is shown to have been sustained by the defendant, nor is it apparent from the deposition that he sustained any. I am also satisfied that in transmitting copies of the interrogatories, plaintiff's counsel had no intention to thereby secure an unfair advantage over the defendant. The deposition, as it is and as far as it goes, may therefore stand for what it is worth, but upon certain conditions only. Under this disposition of the motion, the fact of the receipt by the witness of the interrogatories in advance of his examination, will simply affect the credibility and weight of his testimony. This being so, the defendant must have leave and an opportunity to frame and administer such further cross-interrogatories as he may be advised. In case he elects to avail himself of this privilege, the commission must be returned for further and final execution, at the sole expense of the plaintiffs.

Let an order be entered accordingly.

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Statement of the Case.

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**MAGDALENA RENNER v. JACOB MÜLLER,  
AND OTHERS.**

**I. ALIENS, INHERITING BY.**

**1. GOVERNED BY WHAT LAW.**

(a) By the law in force at the time of the death of the person from whom they claim to inherit.

**1. *Who entitled under such law.***

(a) Only those who at the time of the death are under the then existing law capable of taking by descent.

**2. DISQUALIFICATION, GROUND OF.**

(a) *Inheritable blood.* The disqualification does not rest on lack of inheritable blood, but on a lack of right to inherit, for the reason that the alien is not a citizen or subject of the government where the land lies.

**II. ALIEN MARRIED WOMEN.**

Capable of inheriting, when; *vide infra*.

**III. ALIENAGE AS AFFECTING TAKING BY DESCENT FROM  
A NATIVE BORN OR NATURALIZED CITIZEN DYING BE-  
TWEEN APRIL 15, 1857, AND APRIL 27, 1874.**

**1. ALIENAGE OF CLAIMANT.**

(a) *Who not prevented from taking by reason thereof.*

1. Resident children born in foreign countries of persons then aliens, but who afterwards are duly naturalized; such children being under the age of twenty-one years at the time of the naturalization of their parents.

2. Children of certain citizens, though born out of the limits and jurisdiction of the United States.

3. The foreign-born widow and children of aliens dying during the interval between their application and actual naturalization, upon their taking the oaths prescribed by law.

4. A FREE, WHITE ALIEN WOMAN who, prior to such death, shall have lawfully intermarried with a citizen.

1. This, whether her husband be a native-born or a naturalized citizen.

2. If naturalized, the fact that he was naturalized after the marriage does not alter the case.

3. This, though the woman at the time of marriage was

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not twenty-one years of age, provided she was over twelve.

4. This, though the woman had never been within the United States.

2. ALIENAGE OF ANCESTOR.

1. *Deceased ancestor.* The fact that the claimant is obliged to trace descent through a deceased alien ancestor, *will not preclude* him from inheriting.

2. *Living ancestor.* Alienage of such ancestor *does not enable* one to take by descent as his representative, as if he were deceased.

(a) ANCESTOR, DEFINITION OF, WITH RESPECT TO THIS SUBJECT.

1. Includes both *lineal* and *collateral* ancestors.

3. ALIEN PARENT.

1. *Brothers and sisters*, children of an alien parent, *inherit of each other*. The parent, though living, is by reason of his alienage passed by, and the descent between the children is immediate.

4. TREATY BETWEEN KINGDOM OF WURTEMBERG AND THE UNITED STATES, allowing citizens of either party, to whom land would have descended under the laws of the other but for alienage, to sell the same and withdraw the proceeds under certain restrictions.

*The rights* of the alien claimant in this case under this treaty are not clear, and *should be reserved for decision until the trial of the cause*.

5. ACTS OF LEGISLATURE NOT APPLICABLE.

1868, chapter 513;

1874, chapter 261;

1875, chapters 38, 336;

1877, chapter 111,

*are not applicable*, because not in existence when rights became vested by the death.

The Revised Statutes,

1880, chapter 171;

1843, chapter 87;

1845, chapter 115;

1857, chapter 576,

*are not applicable*, because their operation, so far as this question is concerned, is confined to lands left by a resident alien, except first section of the act of 1843, which is confined to lands which had

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been purchased and conveyed, or had been devised, or had descended, prior to its passage.

IV. INJUNCTION.

1. EJECTMENT.

(a) Where, under the laws of this State, it is clear that the title to the land in question descended to and vested in the plaintiff, and the only claim of defendants (who are aliens) is under a treaty between the United States and a foreign country, *and it is not clear what rights they have under such treaty*, and there is danger that the rents and profits of such land may be removed beyond the jurisdiction of the court and of the State, *a proper case for an injunction is made.*

*At Special Term, February 7, 1879.*

Motion for injunction.

FREEDMAN, J.—This is a motion for an injunction to restrain the defendant Müller from paying over rents of real estate, situate in the city of New York, to the alien next of kin of Karl Hafner, deceased.

The action is to recover possession, and the rents and profits of the property in question, from Jacob Müller and his tenants in possession under him ; and plaintiff's right to possession is founded upon the allegation that she is the sole heir of the deceased capable of taking the inheritance.

Karl Hafner died seized of the fee of the property in question, and intestate, on January 19, 1874. At the time of his death he was a citizen of the United States, and an actual resident of the city and county and State of New York. At the same time, the following of his blood relatives were residents of the United States, viz. :

1. The plaintiff, Magdalena Renner, a niece, the daughter and legitimate child of his sister, Caroline Sinn, who had died July 5, 1855, leaving her surviving no other child, who at the time of Karl Hafner's death was a citizen of the United States.

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2. Christine Müller, another niece, wife of the defendant Jacob Müller, and the daughter and legitimate child of his sister, Christine Rosine Wieland, who then was still alive and a resident of the kingdom of Wurtemberg.

3. Michael Wieland, a nephew, who is a brother of Mrs. Müller, and the son of Hafner's sister, Christine Rosine Wieland ; and

4. Another nephew, the son of a deceased brother, which nephew had come to the United States in the autumn of 1873.

The three first named resided in the State of New York, and the fourth in Pennsylvania.

Karl Hafner also left him surviving a mother (since deceased), two sisters, one brother, two nephews, and five nieces, natives and residents of the kingdom of Wurtemberg, none of which had ever been in this country, and all of which were aliens.

Upon the argument both sides agreed that Hafner's title descended, at the moment of his death, upon some one or more of his heirs-at-law, or, in default of heirs, escheated to the State under the statute. It could not remain in abeyance, but had to go somewhere. If there was no one ready and capable of taking it, it escheated. If, at the moment referred to, there was but one heir capable of taking, the title vested in him or her absolutely and exclusively, and no subsequent act of the legislature could divest it.

The parties differ widely, however, upon the question of the citizenship of some, and the rights, as conceded aliens, of others of Hafner's next of kin, and the questions involved in those conflicting claims are of such great importance as to justify a somewhat extended discussion.

The rule of the common law as to the rights of aliens, as stated by Lord COKE, and as recognized in

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this State, except so far as it has been changed or modified by statute, is :

“That an alien may purchase lands, tenements or hereditaments, to himself and his heirs, and, although he can have no heirs, yet he has capacity to take a fee simple, but not to hold it. For, upon office found, the king shall have it by his prerogative, of whomsoever the land is holden. And so it is, if the alien doth purchase land and die, the law doth cast the freehold and the inheritance upon the king. If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king, upon office found, shall have them ” (*Co. Litt.* 2, b).

In New York proceedings by office found which were formerly authorized by statute (2 *R. S.* 586) are abolished, and ejectment is provided as the first remedy (*Code*, § 428).

At common law, therefore, and where no prohibitory statute is in the way, an alien can take an estate in fee by purchase or devise, and can hold it against all parties except the State. But he cannot take by inheritance, nor transmit by descent (*Mooers v. White*, 6 *Johns. Ch.* 365 ; *Fairfax's Devisee v. Hunter's Lessee*, 7 *Cranch*, 603 ; *People v. Conklin*, 2 *Hill*, 67 ; *Wadsworth v. Wadsworth*, 12 *N. Y.* 376 ; *Munro v. Merchant*, 28 *Id.* 9).

In New York the acquisition, tenure, alienation and descent of real property are regulated by statute. The people of the State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State ; and all lands the title to which fails from a defect of heirs, revert or escheat to the people (1 *R. S.* 718).

All lands within the State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners



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according to the nature of their respective estates ; and all feudal tenures of every description, with all their incidents, are abolished (*Id.* § 3).

Every person capable of holding lands (except idiots, persons of unsound mind, and infants), seized of, or entitled to, any estate or interest in lands, may alien such estate or interest at his pleasure, with the effect, and subject to the restrictions and regulations provided by law (1 *R. S.* 719, § 10).

But the capacity to hold lands, and of taking the same by descent, devise or purchase, was originally confined to citizens of the United States (*Ib.* § 8).

The chapter relative to the title of real property by descent contains a series of canons specifically regulating the descent. It also prescribes that in all cases not expressly provided for, the inheritance shall descend according to the course of the common law (1 *R. S.* 753, § 16).

It was also enacted, at an early day, that any alien who had or might come into the United States, upon making and filing with the secretary of state a deposition or affirmation, in writing, that he is a resident in the State, and intends always to reside in the United States, and to become a citizen thereof as soon as he can be naturalized, and that he has taken such incipient measures as the laws of the United States require to enable him to obtain naturalization, could take and hold real estate of any kind, to himself, his heirs and assigns forever, and might, during six years thereafter, sell, assign, mortgage, devise and dispose of the same, in any manner, as he might or could do if he were a native citizen, but should have no power to lease or demise until he should become naturalized (1 *R. S.* 720, §§ 15, 16).

It was further provided that if any such alien should die within the six years intestate, his estate should descend to his heirs, if he have any who are

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inhabitants of the United States, in the same manner as though he died a citizen of the State (1 R. S. 720, § 18).

After the six years the alien lost all the privileges so secured, except the right to hold the estate, unless he became naturalized according to the provisions of the laws of the United States.

The same statute also provided that any such alien should not be capable of taking or holding any lands or real estate which might have descended, or been devised or conveyed to him previously to his having become such resident, and made such deposition or affirmation as aforesaid (§ 17).

It has been a subject of dispute whether this '17th section extended to aliens who had not complied with the provisions of the sections immediately preceding, and thus changed the common-law rule, or whether it was limited to aliens who had complied with the provisions; in other words, whether it was intended to prevent aliens from taking real estate except upon a fulfillment of the requirements of the statute, or only intended to confine the benefits, conferred by the act on those who complied with its provisions, to the property thereafter acquired by them.

It has been decided in the case of *Wright v. Saddler* (20 N. Y. 320), that the object of this section was to confine the peculiar benefits of the act to cases where lands were acquired after the conditions required had been performed; and that as to lands previously acquired by those who availed themselves of the act and those acquired by aliens not within the act, the common law was left in force.

By subsequent enabling acts, viz.: chapter 171, *Laws of 1830*; chapter 87, *Laws of 1843*; chapter 115, *Laws of 1845*; chapter 576, *Laws of 1857*, the capacity of resident aliens to hold and convey real estate was

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still further extended. Time and space do not permit any extended reference to them.

A passing notice should be taken, however, of the act of 1845, as the most important of them. By that act a resident alien was not only empowered to take by purchase or devise, upon making and filing the deposition or affirmation required by the former statutes, but it was also expressly provided that, upon making and filing such deposition or affirmation, he might hold all real estate previously granted, conveyed or devised to him in the same manner and with the like effect as if he at the time of such grant, conveyance or devise, had been a citizen of the United States. Provision was also made for the right of dower of the wives, and the rights of the grantees and devisees of alien residents of this State. By section 4, even alien heirs of resident aliens were made capable, in certain cases and upon compliance with certain conditions, to take and hold by descent.

The section last referred to has been amended by chapter 261, *Laws of 1874*, and chapter 38, *Laws of 1875*, so as to enable aliens to take lands by descent from naturalized or native citizens as well as from resident aliens. But as these amendments were made after Hafner's death, and consequently after the rights of all parties had become fixed, they may be at once dismissed. For the same reason chapter 111, *Laws of 1877*, which seems to be an amplification of chapter 336, *Laws of 1875*, and of chapter 513, *Laws of 1868*, need not be considered. The three last named statutes simply relate to the confirmation of the titles of citizens which may be questioned by reason of the alienage of former owners.

At the time of Hafner's death, therefore, the law was that none but a citizen could inherit a fee by descent from a citizen ancestor. To this extent the common law, which upon this point rested upon the policy

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of the feudal law, still prevailed, notwithstanding the abolition of all feudal tenures.

I now proceed to consider the objections which have been urged against plaintiff's claim, and especially against her standing in court.

I. The first objection is, that at the time of Hafner's death the plaintiff was an alien.

It appears that she was born in the kingdom of Wurtemberg, on September 20, 1853; that her parents never resided in, and never were citizens of, the United States; that she came to the United States in 1869; that, consequently, at the time of Hafner's death, she had not resided five years within the United States, nor had she arrived at the age of twenty-one; and that she had not, at that time, declared her intention to become a citizen, nor had she been admitted to citizenship by the judgment of any court.

If these were all the facts, the charge of alienism would be well founded, and plaintiff would have no standing in court; for none of the statutes in force at the time of Hafner's death, and above referred to, is of any avail to the plaintiff for the reason that Hafner did not die as a resident alien, but as a citizen; and the plaintiff had at the time of his death neither filed the deposition or affirmation required by the laws of New York, nor declared her intention to become a citizen of the United States, pursuant to the acts of congress. Even if the premises in question had been devised to her by will, she could not, upon the facts and the law, so far considered, have taken them, for the statute relating to wills and the distribution of estates provides that every devise of any interest in real property, to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate, shall be void. The interest so devised shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his

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will to the residuary devisees therein named, if any there be, competent to take such interest (2 R. S. 57, § 4).

Moreover, it is well settled that a statute which merely authorizes an alien to take and hold real estate by purchase or devise, does not change the general law of descent.

According to the common law of this country it is not enough that a person is in the order of succession prescribed by statute, as required to take lands by descent, upon the death of the owner thereof intestate. He must also be a citizen of the United States at the time of the death of the intestate. He cannot qualify himself to inherit by becoming a citizen afterward. This disqualification does not rest upon a lack of inheritable blood, though that expression frequently occurs in the books, but, as shown by *Mr. Bingham on Descents*, upon a lack of right to inherit for the reason that the alien is not a citizen or a subject of the government where the land lies. The inheritance itself is made up of a right to the possession and use of certain land, which right is derived from a grant or contract of the State. Hence, where, by the law of the State, a person who is not a citizen cannot be a party to such a grant or contract, he fails to inherit merely from lack of legal capacity to become a party to such grant or contract. And at common law the citizen encounters the same difficulty when he finds that his right of succession must come from the intestate, not directly or immediately, but indirectly and mediately, through some alien relative deceased before the intestate. In the latter case the difficulty has been removed by statute; in the former the disqualification still exists.

It is claimed, however, on the part of the plaintiff, that by virtue of her marriage with Michael Renner,

she became a citizen of the United States by force of section 2 of the act of congress passed February 10, 1855.

Michael Renner came to the United States in 1865, and has ever since that time resided here. On June 4, 1871, at the city of New York, he and the plaintiff were married, and on October 10, 1873, he was, on his application, duly naturalized and admitted to citizenship.

The acts of congress relative to the naturalization of aliens require, among other things, as conditions precedent to admission, an application in a certain prescribed manner, and proof of a residence of five years within the United States. Even minors, on arriving at the age of twenty-one, must, as a general rule, comply with these conditions before they can become citizens. This is the general policy of the law. Prior to 1855, exceptions were made in favor of:

1. Resident children of persons duly naturalized, being under the age of twenty-one years at the time of the naturalization of their parents;
2. Children of certain citizens, though born out of the limits and jurisdiction of the United States; and
3. The widow and children of aliens dying during the interval between their application and actual naturalization.

The persons falling within either of the first two classes are considered citizens of the United States without a formal application for admission, and those falling within the third class upon taking the oaths prescribed by law.

By section 2 of the act of 1855, it was provided:

“Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.”

It was held by the court of appeals in *Burton v.*

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Opinion of FREEDMAN, J.

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Burton (1 *Keyes*, 373), that the words "who might lawfully be naturalized under the existing laws," were only a limitation of the application of the section to a class of persons,—viz., to white women,—and hence it was determined that an alien woman who had married a citizen, but who had never been in the United States, became, by the act of marriage, a citizen, and that such act stood in the place of all the requirements demanded by the naturalization laws.

The defendants insist that the plaintiff does not come within this decision, because at the time of her marriage with Michael Renner the latter was not a citizen, though he became such afterwards. This precise point came up in *Kelly v. Owen* (7 *Wall.* 496), in which case the supreme court of the United States, approving the doctrine of *Burton v. Burton*, held as follows:

"As we construe this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms 'married,' or 'who shall be married,' do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that, whenever a woman who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her. The construction which would restrict the act to women whose husbands, at the time of marriage, are citizens, would exclude far the greater number for whose benefit, as we think, the act was intended. Its object, in our opinion, was to allow her citizenship to follow that of her husband, without the necessity of any applica-

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Opinion of FREEDMAN, J.

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tion for naturalization on her part ; and if this was the object, there is no reason for the restriction suggested. The terms 'who might lawfully be naturalized under the existing laws,' only limit the application of the law to free white women. . . ."

The defendants also contend that the plaintiff does not come within the decision of either of the two foregoing cases, because on the day of Hafner's death she was not twenty-one years of age, and for that reason could not, on that day, have been naturalized under the laws existing prior to the act of 1855. This objection has no greater force, if as much, than the objection urged against Mrs. Burton. The plaintiff was no more incapacitated on that account, than Mrs. Burton was by reason of non-residence. Indeed, she was not so much, for, if necessary, she could confessedly have become naturalized under the naturalization act within a few months after Hafner's death, while Mrs. Burton could not for five years after her husband's death. Age of twenty-one years under the then existing laws was simply one of the qualifications necessary for an applicant to have, just as it was necessary for him to show a five years' residence. The plaintiff comes clearly within the reasoning, if not the letter, of the two decisions. The statute says "any woman," and not "any woman of twenty-one years of age." There is no more reason, in considering the general policy of the naturalization laws, why, in case of marriage with a citizen, the requirement of twenty-one years of age should not be dispensed with, than the requirement of a five years' previous residence. They are both made requirements for the purpose of furnishing evidence of fitness to undertake the duties and responsibilities of citizenship, and one is no more important or necessary than the other. The fact of marriage furnishes evidence of such fitness, and the law says that a woman who is capable of lawfully entering into the marriage



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relation and does so, marrying a citizen, is fitted to become, and *ipso facto* becomes a citizen. The duties are no more onerous upon her than upon a native female of the same age, and she is still under the same disabilities. Her naturalization simply removes the disability resting upon alienism, and throws around her the protection of the nation. The propriety of this may be urged as a cogent reason in support of such a construction of the act as will give to the wife of the citizen the same protection as it gives to him and to their children. She has linked her destiny with the country by the strongest of ties. Citizenship does not depend upon age. To be qualified as a voter, a citizen must be of the age of twenty-one years and upwards. On the other hand, infants may be citizens by birth.

I repeat, therefore, that there is nothing in the general policy of the naturalization laws which requires such a construction of the act of 1855 as will exclude the wife of a citizen from citizenship, either because at the time of the marriage she was an alien, or because her husband was an alien, if he subsequently became a citizen, or because she had not resided five years within the United States, or was under twenty-one years of age. All that is necessary is a valid marriage with a citizen, or one who subsequently becomes such, and that presupposes lawful capacity to contract it. At common law the age of legal consent is fourteen in males and twelve in females, and this rule is still in force in New York.

II. Defendant's second objection to plaintiff's claim is, that, even if at the time of Hafner's death the plaintiff was a citizen, she was incapable of inheriting, for the reason that her mother, a sister of the intestate, through whom she must trace her descent, was an alien. That the latter always was, and in July, 1855, died, an alien, is conceded.

The objection is obviated, however, by section 22 of

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Opinion of FREEDMAN, J.

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chapter II. of part II. of the Revised Statutes, which provides that no person capable of inheriting under the provisions of the said chapter shall be precluded from such inheritance by reason of the alien issue of any ancestor of such person (1 *R. S.* 754, § 22).

This section is a modification of the common-law rule that no person can inherit who is compelled to trace his title through an alien ancestor, and it removes the incapacity which, but for its existence, would attach to the plaintiff.

The word "ancestor," as used in this statute, has been made the subject of much discussion, whether it should be construed to mean lineal ancestors only, or whether collateral ancestors were also intended, and it was finally held to embrace both lineal and collateral ancestors. They are ancestors of the estate, not of the blood (*McCarthy v. Marsh*, 5 *N. Y.* 263).

III. Defendant's third objection to plaintiff's claim is, that the fact that the mother of Karl Hafner, at the time of his death, was alive and an alien, impeded the descent to plaintiff's mother, and that the plaintiff has no better claim than her mother would have had, if she had been alive and capable of inheriting at that time. It must be conceded that under the canons of the Statute of Descents the plaintiff, as a citizen, can only succeed, if at all, as the representative of her deceased mother, and that in this aspect of the case she must claim through her mother. But this she can do successfully.

It was held in *Jackson v. Green* (7 *Wend.* 333), that, at common law, one brother could inherit of another, though the father was an alien. And it is said :

"Collateral descent from brother to brother is immediate, taking no notice of the father; but from uncle to nephew, or nephew to uncle, the descent is mediate, the father being the medium through which the descent must pass. Hence, one brother may in-

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Opinion of FREEDMAN, J.

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herit from another, though the father be an alien, or attainted; but a grandson cannot inherit from his grandfather, the father having died in the life of the grandfather, provided the father was an alien, or attainted; but the land shall escheat."

It has become a maxim of the law that, as between brothers, a father, although a *medium sanguinis*, is not a *medium hereditatis* (Parish v. Ward, 28 Barb. 328).

It has also been decided, that the rule which enables brothers, sons of an alien father, to inherit of each other, because the descent between them is immediate, applies also between one of the brothers and the representative of the other, and also between the representatives of both of them (McGregor v. Comstock, 3 N. Y. 408; McCarthy v. Marsh, 5 Ib. 274; Smith v. Mulligan, 11 Abb. N. S. 438).

Under the laws of New York, sisters stand upon the same footing as brothers, and hence the descent is also immediate between brothers and sisters. This being so, it follows that if an alien father cannot impede the descent between them, or their representatives, the same rule, as between them, must apply in the case of an alien mother. The fact, therefore, that at the time of Hafner's death his mother was alive and an alien, can constitute no obstacle to inheritance between such of Hafner's brothers and sisters, or their representatives, as are otherwise capable and entitled to inherit.

The rule laid down by Chancellor KENT that "if a citizen dies and his next heir be an alien who cannot take, the alien cannot interrupt the descent to others, and the inheritance descends to the next of kin who is competent to take, in like manner as if no such alien had ever existed" (2 Kent, 56), applies to all cases in which the claimant does not make title through the alien, but where he or she can deduce his or her

pedigree from the person dying seized, by leaving out or passing by the alien. Hafner's mother may, therefore, be left out and passed by ; and his sister (plaintiff's mother) having died before him, and the impediment which her alienism would have otherwise presented having been obviated by statute, the plaintiff labors under no disqualification.

IV. Defendant's fourth objection to plaintiff's claim is, that even if the preceding three objections were untenable and the plaintiff were competent of taking by descent, she would not be sole heir, but that Christine Müller, another niece, and Michael Wieland, a nephew of the deceased, would be entitled to share with her ; and that for this reason, if no other, she cannot maintain ejectment as sole heir. Christine was married to the defendant, Jacob Müller, in the city of New York, in the year 1862, and at the time of such marriage was twenty-two years of age. In 1863, Jacob Müller became a citizen of the United States, and thereupon, under and by virtue of the act of 1855 hereinbefore considered, his wife also became a citizen. It does not appear whether Michael Wieland was ever admitted to citizenship, nor is the fact material. The difficulty in the claim of both Christine Müller and Michael Wieland is, that though residents of New York at the time of Hafner's death, they were the children of Christine Rosine Wieland, a sister of the intestate, who, at the time of the death of the intestate, was alive and an alien. As to them, therefore, even if they were citizens, section 22 of 1 Revised Statutes, page 754, does not apply. That section was taken substantially from the 11 and 12 *Wm.* 3, chapter 6, and this has always been understood to apply only to the case of a deceased, not of a living ancestor.

In *McCreery's Lessee v. Somerville* (9 *Wheat.* 354), which arose in Maryland under a statute substantially

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Opinion of FREEDMAN, J.

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like the provision of the English act, the statute was construed in the same way.

So it has been held under the statute of New York that that did not enable a citizen to take by descent as the representative of an alien parent alive at the death of the intestate (*People v. Irvin*, 21 *Wend.* 128; *McLean v. Swanton*, 13 *N. Y.* 535).

These cases have settled the law to be, that when in the course of descent a title comes to an alien living, who, but for his alienage, would have been the heir, it will not pass through him but will pass by him to the next one who is competent.

V. The defendants finally insist that the alien next of kin are entitled to take by descent, by virtue of the treaty of 1844, made between the United States and the kingdom of Wurtemberg, the said alien next of kin being subjects of that kingdom. That treaty allows subjects or citizens of either party, to whom lands would have descended under the laws of the other but for their alienage, a term of two years to sell the same, and to withdraw the proceeds thereof without molestation. It also provides that the said term may be reasonably prolonged according to circumstances. More than five years having already elapsed since Hafner's death, and the defendants having failed to show a prolongation of the term, it may be a serious question whether the alien claimants are still within the protection of the treaty, or whether, if they once lost it, they have any remedy left. For the treaty makes no provision as to the manner or means in or by which the prolongation may be applied for or granted, and it may well be that in the absence of appropriate legislation upon the subject, that part of it which calls for a reasonable prolongation remains a dead letter. The plaintiff also contends that the treaty as a whole has been impliedly abrogated. Upon reflection, I have come to the conclusion that these as well as all other questions arising

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Opinion of FREEDMAN, J.

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upon this branch of the case, should be reserved for the trial of the issues. For the purposes of the present motion, it is sufficient to say that the rights of the alien claimants in that respect are not clear.

It appearing, then, that, aside from the questions arising under the treaty, all the objections against plaintiff's claim are unfounded, that under the laws of this State the title to the property in question descended at the time of Hafner's death to the plaintiff as the only heir competent to take it, and that there is danger that the rents and profits of such property may be removed by the defendant, Jacob Müller, beyond the jurisdiction of this court and of this State, the plaintiff has shown enough, according to well-settled rules of law, to entitle her to an injunction restraining such removal during the pendency of the action.

The motion for the continuance of the injunction during the pendency of the action must be granted, with ten dollars costs, to abide the event. Order to be settled on notice.

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Statement of the Case.

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MEMORANDUM CASES.

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MENDLICH GOTTBERG, PLAINTIFF AND RESPONDENT, v. WILLIAM C. CONNER, SHERIFF, &C., DEFENDANT AND APPELLANT.

CONVEYANCES TO HINDER AND DEFRAUD CREDITORS, &c., 2 R. S. 137, §§ 1, 5.

The statute does not contemplate that the title of a purchaser for value shall be impaired, unless the notice of fraudulent intent on the part of the vendor is a notice previous to the perfecting of the sale. The statute specifies, in such case, that the notice shall be a "*previous* notice," but the plaintiff, in his request, omitted the word "*previous*," and there was no error in the court declining to so charge, and charging the modification which was sound as a statement of law.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided April 1, 1878.*

Appeal by the defendant from a judgment entered June 16, 1876, in favor of the plaintiff, for \$1,522.95, and from an order denying a motion on the minutes for a new trial. The action was for the wrongful seizure and conversion of the stock and fixtures of a store in possession of plaintiff, by the defendant, under authority of a warrant of attachment against the party owning the business before plaintiff.

The principal question upon the trial was as to the validity of the transfer of the business to plaintiff, as against creditors.

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Opinion of the Court, by CURTIS, Ch. J.

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Many exceptions were taken, especially to the judge's charge, which are considered upon this appeal.

CURTIS, J., wrote for affirmance, with costs, holding principle laid down in head-note.

SANFORD, J., concurred.

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DAVID DIXON, PLAINTIFF AND RESPONDENT, v.  
BENJAMIN J. WENBERG, ET AL., DEFEND-  
ANTS AND APPELLANTS.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided April 1, 1878.*

Appeal from an order of the special term, directing judgment for plaintiff, on the answer of the defendants as frivolous.

*George A. Black*, for respondents.

*Edward H. Hobbs*, for appellants.

BY THE COURT.—CURTIS, Ch. J.—The defendants stipulated, as agents for the owners of twelve thirty-seconds of a vessel, that the freights on a certain voyage should be collected by the plaintiff, who was to command the vessel. The voyage was made, and the freights, amounting to \$700, were thereupon collected by the defendants, who claim that the vessel and owners are indebted to them for advances and services and commissions, which they allege they have the right to set-off against this sum.

The defendants are bound by their stipulation, and should comply with it. The right of the plaintiff to



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Opinion of the Court, by CURTIS, Ch. J.

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collect this money, in accordance with the defendants' agreements that he should, is not prejudiced or affected, because some other parties owe the defendants for advances, services and commissions, nor does it appear to be connected in any respect with the institution or discontinuance of the proceedings in admiralty, mentioned in the pleadings.

The order appealed from should be affirmed, with costs.

SANFORD, J., concurred.

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JACOB LORILLARD, PLAINTIFF AND APPELLANT,  
v. WILLIAM P. CLYDE, AND ANOTHER, DE-  
FENDANTS AND RESPONDENTS.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided April 1, 1878.*

Appeal from an order of the special term, directing that the defendants have judgment on their demurrer to the plaintiff's complaint, with leave to the plaintiff to amend his complaint as to the statement of the cause or causes of action, on payment of costs.

*Horace Barnard*, for appellant.

*Andrew Boardman*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—I think the demurrer should be sustained, for the reasons assigned in his opinion by the learned judge at special term, and that the order appealed from should be affirmed, with like leave to the plaintiff to amend his complaint.

SANFORD, J., concurred.

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Statement of the Case.

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**HENRY B. HEWITT, PLAINTIFF AND APPELLANT,  
v. SAMUEL C. MORRIS, DEFENDANT AND RE-  
SPONDENT.**

As between the keeper of a house of ill fame, and the landlord who rents the house for that purpose, and the person who equips it for the same purpose, neither has any advantage over the other in morals, and neither is to be more favorably considered by the court or jury in weighing testimony, and determining the credit to be given. Review of the evidence and facts in this case, by the court, from which there appears no good reason for disturbing the verdict.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided April 1, 1878.*

Appeal by plaintiff from a judgment upon a verdict in his favor of \$1.05, and from an order denying a motion for a new trial upon the minutes.

The action was brought to recover the value of certain personal property alleged to have been converted by defendant.

CURTIS, Ch. J., wrote for affirmance, holding principles above laid down.

SANFORD, J., concurred.

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**THE AMERICAN MEDICINE COMPANY, PLAINT-  
IFF AND RESPONDENT, v. ROBERT KEISLER,  
DEFENDANT AND APPELLANT.\***

APPEAL FROM JUDGMENT.—WHAT CAN BE CONSIDERED UPON.—CON-  
VERSION.

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\* See same case, 6 J. & S. 407.

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Opinion of SPEIR, J.

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The appeal is from the judgment only, and not from the order denying a motion for a new trial on the judge's minutes. In order to bring up the case for review upon the facts there must be an appeal from the order denying the motion for a new trial. The mere denial of a motion made upon the judge's minutes presents no question of fact for review upon appeal from the judgment. The appeal should be from an order denying such motion, and exception taken thereto, if the facts are to be reviewed (*Matthews v. Mayburg*, 63 N. Y. 656). On the other hand, if it be claimed that the order denying such motion is an intermediate order involving the merits and affecting the judgment, the New Code requires that, before it can be reviewed upon an appeal from the judgment, it must be specified in the notice of appeal (§§ 1301, 1316). Questions of law, therefore, only are to be considered.

Defendant offered to show that the plaintiffs had recovered in another action a verdict, including a demand of *some* of the property named in this action. The offer was not for a recovery of the *same* property. There was no offer to show that satisfaction had been obtained on the judgment, or that plaintiffs had made their election by suing out execution,—*Held*, inadmissible (*Osterhout v. Roberts*, 8 Cow. 43; *Livingston v. Bishop*, 1 Johns. 290).

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

This action, brought to recover damages for conversion of personal property. Plaintiff recovered a verdict, upon which judgment was entered, from which defendant appeals.

SPEIR, J., wrote for affirmance, with costs, holding above principles.

FREEDMAN, J., concurred.

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Statement of the Case.

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**SAMUEL ROWLAND, PLAINTIFF AND APPELLANT,  
v. THE MAYOR, ALDERMEN, &c., OF NEW  
YORK, DEFENDANTS AND RESPONDENTS.**

**SALARIES OF COURT OFFICERS, &c.**

The resolution of the board of supervisors of New York city, of May 26, 1870, increasing the salary of certain officials, held void under chap. 882, section 3, *Laws of 1870*.

The claim of plaintiff, a court officer, for said increase, &c.,—*Held*, invalid.

Before SPEIR, SANFORD and FREEDMAN, JJ.

*Decided November 4, 1878.*

**Appeal from judgment.**

Plaintiff was appointed, in the year 1852, an attendant or officer upon the supreme court in this county, by the board of supervisors, and continued to hold that position until March 1, 1874. On December 20, 1866, his salary was fixed at the rate of \$1,200 per annum, and he was paid at that rate from June 1, 1870, up to the time of his discharge.

It was claimed on behalf of the plaintiff that, by virtue of a resolution passed by the board of supervisors on May 26, 1870, his salary was fixed, from and after June 1 of that year, at the rate of \$1,500 per annum.

This suit is brought to recover \$639.55, being the difference between the two rates of salary (\$1,200 and \$1,500 per annum) from June 1, 1870, to July 19, 1872.

On the trial the court held, as a conclusion of law, that the board of supervisors were, by section 3 of chapter 382 of the *Laws of 1870*, prohibited from increasing the salaries of court attendants, and that the resolution of May 26, 1870, was void.

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Statement of the Case.

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From the testimony of the plaintiff it appeared that he waited and attended on two judges at their houses and at the court-house, carrying papers and letters, and went out on business of different kinds for the judges, fixed their benches, locked up the court stationery, attended the door, and other work of a similar character; that he never took an oath of office nor administered an oath to a witness, but assisted particular officers in their care of a jury, brought up the rear, and closed the door.

FREEDMAN, J., wrote as follows :—The main question involved has been decided by the court of appeals in *Sweeny v. Mayor, &c.* (58 *N. Y.* 625 ; affi'g 5 *Daly*, 274), and that decision is fatal to plaintiff's claim. It is an express decision of the question before us, and as such it has never been modified or questioned. The mere fact, therefore, that the reasoning of a few later cases, involving somewhat similar, but really different questions, seems to indicate a change of views, affords no justification for this court for a departure from it.

The judgment should be affirmed, with costs.

SPEIR, J., concurred.

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HENRY SCHILE, PLAINTIFF AND RESPONDENT, v.  
WILLIAM BROKHAHNE, DEFENDANT AND  
APPELLANT.\*

Before SPEIR, SANFORD and FREEDMAN, JJ.

*Decided November 4, 1878.*

Appeal by defendant from judgment entered upon

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\* See same case as to "*Bill of Particulars, &c.*," 9 *J. & S.* 353.

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Statement of the Case.

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the verdict of a jury, and from order denying motion for a new trial on the minutes.

*L. H. Rowan*, for appellant.

*Nehrbas & Pitshke*, for respondent.

This case involved mainly questions of fact.

FREEDMAN, J., wrote for affirmance, with costs.

SPEIR, J., concurred.

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DAVID G. McKELVEY, PLAINTIFF AND RESPONDENT, v. PRYCE LEWIS, DEFENDANT AND APPELLANT.

I. JUDGMENT.—AMENDMENT OF, AFTER APPEAL.

1. RECEIVER GIVEN ADDITIONAL POWERS.

(a) A judgment dissolving a copartnership and appointing a receiver may be amended, after appeal therefrom, by the insertion of a clause directing the receiver to take possession of the partnership property, and ordering the parties to deliver the same to the receiver, and by the insertion of a clause authorizing and directing the receiver to sell and dispose of the partnership property, "under and pursuant to the usual course and practice of this court, and to collect and receive the outstanding debts due to the said firm, and to hold and keep the proceeds of such sales and collections, until the final determination of this action or the further order of this court."

This, although the appellate court has become possessed of the cause upon the appeal.

Before SANFORD and FREEDMAN, JJ.

*Decided November 4, 1878.*

In this case, after an appeal had been taken by defendant, to the general term, from the special term

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Statement of the Case.

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judgment dissolving a copartnership that had existed between plaintiff and defendant, and appointing a receiver, and after the general term had affirmed the judgment below, and after the defendant had appealed to the court of appeals from said judgment of affirmance, and while that appeal was still pending in the court of appeals, and that court had possession of the cause on appeal, the plaintiff moved at special term that the judgment be amended by the insertion of the clauses set forth in the head-note. The court at special term granted the motion, and the defendant appealed.

*Andrew H. H. Dawson*, of counsel, for defendant and appellant.

*H. E. Davies, Jr.*, and *G. I. Whitehead*, of counsel, for plaintiff and respondent.

PER CURIAM.—The order and judgment as amended should be affirmed, with costs.

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EMILE S. LEGRAND, PLAINTIFF AND RESPONDENT v. MANHATTAN MERCANTILE ASSOCIATION, DEFENDANT AND APPELLANT.

CORPORATION.

1. EVIDENCE IN SUPPORT OF DEFENSE BY, NOT ADMISSIBLE.

(a) In an action brought to recover for services rendered from December 1, 1874, to June 22, 1878, as a general banking clerk and French correspondent, at a stipulated compensation, the answer denied all the allegations of the complaint, except the allegation that defendants were an association; the *minute book* of the corporation is not admissible on its own behalf, for the purpose of showing that there was no resolution of the board of directors authorizing the plaintiff's employ.

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Statement of the Case.

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*Exceptions to the sustaining of general objections to the following questions are not well taken.*

Q. Do you know whether the directors of the company ever authorized the employment of anybody for the purpose of making a code?

Q. Was a code, such as you have heard described by this witness, necessary, or did it appertain in any way to the business of that corporation.

Q. Had the company at this time any use, or was it engaged in any business, in which a code could be used?

Q. As treasurer of the Manhattan Mercantile Association, did you ever have in your possession a dollar of money?

Q. Do you know, as Treasurer of the Manhattan Mercantile Association, or otherwise, whether 500 shares of the capital stock of that company were subscribed for and 25 per centum thereof paid in?

Q. Was there ever the sum of \$25,000 paid into the company?

Q. Did the company ever do any business other than that of appointing a board of directors?

**2. EVIDENCE IN SUPPORT OF CLAIM SUFFICIENT.**

(a) In such action as above, plaintiff, by his own testimony, showed that one of the directors employed him as French correspondent and general clerk, at a certain salary per month; that the company was doing no business; that it was understood he was first to make a telegraphic code, and when business came he was to be French correspondent and to do all the work which would be given him; that he was set at work on a telegraphic code for the company; that all the officers of the company knew he was at work on this code: that there was a slip prepared for entry in the book in which all the salaries to April 1, 1875, including his own, was entered; that every director of the company at that time had seen the slip, that the secretary had frequently told him the amount of his salary, that the making a telegraphic code was no part of his duty as banking clerk or French correspondent.

HELD,

Sufficient to support a direction for a verdict in plaintiff's favor.

*Decided November 4, 1878.*

In this case the trial judge directed a verdict for



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Statement of the Case.

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plaintiff. From the judgment entered upon this direction defendant appealed.

*Gardiner & Goodheart*, attorneys, and *Samuel B. Garvin*, of counsel, for appellant.

*Charles A. Jackson*, attorney, and *Richard Matthews*, of counsel, for respondent.

PER CURIAM. The judgment should be affirmed, with costs.

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EDWARD K. RAUBITSCHKE, PLAINTIFF, v.  
JACOB BLANK, DEFENDANT.

I. FRAUDULENT REPRESENTATIONS.—DEFENSE OF, MUST BE PLEADED.

1. CHECK SUED AS AGAINST MAKER BY A HOLDER AFTER DISHONOR.

(a) Defense of fraudulent representation by the payee to the maker, must be pleaded.

II. REAL PROPERTY.—EXCHANGE OF.

1. STATUTE OF FRAUDS ; CONTRACT, SUFFICIENCY OF, UNDER.

(a) A *check* signed by one of the parties, and a *receipt* given for the check, stating that the check was given on the exchange of properties, mentioning them, and stating the prices of the property, signed by the other party, constitutes a valid contract as against the party signing the receipt, and raises a sufficient consideration for the check.

III. CHECK.

1. *Consideration, what is sufficient.*

See Real Property, *supra*.

Before SPRIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

Exceptions heard at general term.

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Statement of the Case.

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This action was brought on a check made by defendant, to the order of George Herdfelder. The answer alleged that the check was given without any consideration, and that it was transferred to plaintiff after presentment and dishonor, and with full knowledge of all the facts.

On the trial it was conceded that the transfer to plaintiff was after the dishonor of the check, and that plaintiff knew that fact.

It appeared there was an oral agreement between the maker and payee for an exchange of real estate.

In pursuance of this agreement, the maker gave the check in suit, and the payee gave to the maker a receipt which specified that the check was received on the exchange of the properties, mentioning them and stating their prices.

It was verbally understood that the parties were to meet the next day and enter into a formal contract.

They did not do so because the maker of the check backed out of the bargain.

The check and the receipt were the only writings entered into.

It did not appear whether the signer of the receipt still held the property he proposed to exchange or not, as the evidence offered on that subject was, upon objection, excluded.

Defendant offered to prove that at the time the check was given, Mr. Raubitschek himself being present, he made certain representations in regard to the property; that, on ascertaining the next morning their falsity, the defendant refused to carry out the bargain; and that Raubitschek was the agent of Herdfelder in making that bargain.

This was excluded, and exception was taken.

The trial judge directed a verdict for the plaintiff, and ordered the exceptions to be heard at a general term, in the first instance.

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Statement of the Case.

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*John P. Schuchman*, attorney, and *Thomas Darlington*, of counsel, for defendant,—Cited: *Wright v. Weeks*, 25 *N. Y.* 153; *Davis v. Shields*, 26 *Wend.* 341; *Deery v. Parker*, 52 *N. Y.* 494; *Cagger v. Lansing*, 49 *Id.* 550; *Levy v. Brush*, 45 *Id.* 589; *De Bearschi v. Page*, 36 *Id.* 537.

*Kurzman* and *Yeaman*, attorneys, and of counsel, for plaintiff.

BY THE COURT.—The exceptions must be overruled and judgment ordered for the plaintiff, with costs.

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THE PACIFIC PNEUMATIC GAS COMPANY,  
PLAINTIFF AND RESPONDENT, v. JOHN W.  
WHEELLOCK, DEFENDANT AND APPELLANT.

I. JUDGMENT OF SUPREME COURT OF CALIFORNIA ON APPEAL.

1. NOTICE OF APPEAL.

(a) Not necessary one should appear in the judgment roll in order to render it admissible in evidence.

1. The judgment record contained an order made by the supreme court reversing a decision of the court below, also an opinion given by the court on such reversal, also an order entered in the court below, reciting the filing of the *remittitur* from the supreme court, reversing the order and judgment theretofore made by such court, and in pursuance such *remittitur* ordering that judgment be entered in favor of defendant against plaintiff for \$595.66, principal and interest, all in gold coin of the United States; also a *postea* entered in conformity with the order so entered on the *remittitur*, but it contained no notice of appeal.

HELD,

that the record was admissible. It will be presumed that the supreme court became properly possessed of the cause on appeal. The absence from the record of a notice of appeal does not overcome this presumption.

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Statement of the Case.

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## II. CALIFORNIA.

## 1. STATUTE LAW OF, HOW PROVED.

(a) By a volume having on its titlepage the following: "The statutes of California, passed at the fourteenth session of the legislature, 1863. Begun on Monday, the fifth day of January, and ended on Monday, the twenty-seventh day of April.

"Sacramento :

"Benjamin P. Avery, State Printer.

"1863,"

and the testimony of a practitioner at the bar of that State, who stated that that edition was recognized by the bar and courts of that State, and was in fact the only one they had to use, but was unable to state whether he had himself used or had seen others use a volume of that edition in the courts.

Before SANFORD and FREEDMAN, JJ.

*Decided November 4, 1878.*

This action was brought upon a judgment for costs, entered in the third district court of California, in an action brought in that court by this defendant as plaintiff therein against this plaintiff as defendant therein. The judgment was entered in favor of the defendant in that action against the plaintiff therein, upon a *remititur* sent down to that court by the supreme court, reversing with costs a judgment theretofore rendered by that court in favor of the plaintiff against the defendant.

On the trial of this action the counsel for defendant herein objected to the reception in evidence of the record of the judgment sued on, because it contained no notice of appeal to the supreme court. The objection was overruled, and an exception taken.

He also objected to the reception of a printed volume of the laws of California, on the ground that it did not purport to have been "published by authority of the State of California," and that it was not proved that this volume or one of the same edition had ever been admitted in the judicial tribunals of California, as

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Statement of the Case.

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evidence of the laws existing in that State. This objection was also overruled and an exception taken.

The cause was tried before a judge without a jury. The judge before whom it was tried directed judgment for plaintiff for the costs adjudged by the judgment sued on, with interest thereon.

From the judgment in conformity with this direction defendant appealed.

*Robertson & Robertson*, attorneys, and of counsel, for appellant.

*Joseph P. Osborne*, attorney, and of counsel, for respondent.

BY THE COURT.—The judgment should be affirmed, with costs.

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MARY M. BABCOCK, ADMINISTRATRIX OF THE  
GOODS, &C., OF CHARLES A. BABCOCK, DE-  
CEASED, PLAINTIFF AND RESPONDENT, v.  
SAMUEL BONNELL, JR., DEFENDANT AND AP-  
PELLANT.

I. ACCORD AND SATISFACTION.

1. PAYMENT OF A LESSER FOR A GREATER SUM.

(a) When a holder of promissory notes accepts from the maker less than their face, and surrenders the notes to the maker, there is a complete accord and satisfaction, and the maker is discharged from all liability on the notes and on the indebtedness for which they were given.

II. STOPPAGE IN TRANSITU.

1. EFFECT OF, AS CAUSING FAILURE OF CONSIDERATION.

(a) When a note is given for the purchase price of goods, and the goods while in transitu are stopped by the vendor, who takes possession thereof and sells them, the considera-

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Statement of the Case.

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tion for the note fails, and as between the original parties the maker is discharged from all liability thereon, and on account of the purchase.

**III. PROMISSORY NOTES.****1. SURRENDER OF, OPERATING AS ACCORD AND SATISFACTION.**

See *supra*.

**2. FAILURE OF CONSIDERATION, WHAT WILL CAUSE.**

(a) Stoppage in transitu.

See *supra*.

Before SPEIR and FREEDMAN, JJ.

*Decided November 4, 1878.*

This action was in effect to recover from defendant the amount of insurance received by her upon a policy of insurance for \$5,000, dated February 22, 1870, issued upon the life of C. A. Babcock, for the benefit of defendant as a creditor. The loss by the policy was made payable to defendant. All the premiums were paid by the defendant.

The action was tried before the court without a jury.

An underlying question of fact arose on the trial, viz.: whether the policy was taken out as collateral security, for an indebtedness of the firm of C. A. Babcock & Co. to defendant, or as payment for the balance of such indebtedness, after applying thereto this defendant's percentage (or share) of the assets of the firm of C. A. Babcock (which was this insolvent), as soon as they could be turned into money, and the sum of \$705.63, derived from the sale of a cargo of coal consigned to C. A. Babcock and Co., but sold only to this defendant; the court found it was taken out as collateral security. The question then arose whether the indebtedness for which it was taken out as collateral still remained outstanding. The defendant claimed that that indebtedness

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Statement of the Case.

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consisted of three notes, dated September 30, November 11, and November 15, 1869.

As to the note of November 15, it appeared in evidence that it was given for a cargo of coal sold to Charles A. Peabody & Co. by defendant, which coal was shipped to that firm; that defendant stopped the coal in transitu, and took possession of it on February 21, 1870, and thereafter sold it.

As to the notes of September 30 and November 11, it appeared that one Wheelwright, acting under the following letter from C. A. Babcock & Co. (which firm was then insolvent), to wit:

OFFICE OF C. A. BABCOCK & CO., }  
BANGOR, 19 *March*, 1870. }

SAMUEL BONNELL, Jr., Esq., New York.

*Dear Sir:* Our friend, J. S. Wheelwright, Esq., will visit New York in the early part of next week, and we will avail ourselves of the opportunity to have him arrange for the settlement of your claim against us, leaving in abeyance the cargo of Hepzibah, and the note given in settlement of same. We have not yet heard from the New Boston Coal Mining Company, and presume Mr. Ogden has not yet been able to go to his office.

Yours, truly,

C. A. BABCOCK & CO.

—paid to defendant \$925, and received therefor these two notes, which he subsequently surrendered to C. A. Babcock & Co.

The court held the consideration for the note of November 15 wholly failed, and that the notes of September 30 and November 11 had been compromised and settled, and the liability of C. A. Babcock to the defendant thereon had been extinguished. And further held that the entire indebtedness of C. A. Babcock & Co. to the defendant was satisfied and discharged before the death of Charles A. Babcock.

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Opinion of SANFORD, J.

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The following opinion was delivered in the court below :

SANFORD, J.—“ Upon the evidence in this case I am satisfied, and therefore find, as matter of fact, that the defendant never acquired or had any interest in the policy upon the life of plaintiff's intestate, or in the money to accrue and become payable thereon, except as a creditor of the firm of C. A. Babcock & Co., whereof the plaintiff's intestate was a member, and to the extent of his claim against that firm. As such creditor, and to the extent of such indebtedness, he held the policy as collateral security. The claim set up in his answer of an absolute and indefeasible title to the policy, and of the receipt by him in payment and satisfaction of his demand, is wholly unsupported by the evidence, and, indeed, is refuted by his own letters and his testimony.

“ I further hold and find that the entire indebtedness of that firm to the defendant was satisfied and discharged before the death of said intestate. Under the circumstances of the case, as they appear in evidence, the transfer by defendant to Wheelwright of the two notes, dated respectively September 30 and November 11, 1869, and their subsequent transfer and surrender by Wheelwright to the firm of C. A. Babcock & Co., operated as a compromise and settlement thereof, and extinguished the liability of that firm to the defendant thereon. The seizure and sale by defendant of the coal shipped by the *Hepzibah* discharged the liability of C. A. Babcock & Co. upon their note of November 15, 1869. The consideration of that note wholly failed when the defendant assumed to stop the coal in *transitu*, and to sell it to Farrar. There is no evidence that C. A. Babcock & Co. ever agreed to make good to defendant the difference between the price paid by Farrar, and the amount of their note. The evidence



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Opinion of SANFORD, J.

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fully warrants the inference that, as between them and the defendant, the sale was rescinded, and that the defendant subsequently dealt with Farrar on his own and not on their account. The sale to Farrar was consummated May 4, 1870, and thereafter the defendant held the policy only as security for the reimbursement of premiums paid by him thereon.

“I do not think that the plaintiff should be estopped, by her intestate’s disclaimer, on the part of himself and his family, of a “wish to have any interest or advantage in it,” from asserting her legal rights under the policy, nor does the language of such disclaimer seem to me sufficient to change the legal relations previously existing between her intestate and the defendant. It is at most the expression of an erroneous opinion as to those relations, and, in my judgment, concludes no one.

“If the amount already received by the defendant on account is insufficient to reimburse the premiums paid by him with interest, he may be allowed the deficiency out of the fund in court, subject to such allowance; the fund must be paid to the plaintiff; judgment is ordered accordingly, but no costs are allowed to either party.”

Judgment was entered in conformity to this decision, adjudging that plaintiff was entitled to the amount received by defendant upon the policy, less the premiums paid by him, and interest, and adjudging that as to so much of the premiums paid by defendant as to which he had not been reimbursed out of moneys received by him upon the policy, with interest, be paid out of the fund on deposit in the United States Trust Company (in which company, by an order of this court, the amount received by defendant on the policy, less certain premiums, and the interest thereon, had been deposited), and that the balance of said fund be paid to plaintiff.

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Statement of the Case.

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From this judgment defendant appealed to the general term.

*N. & M. Niles*, attorneys, and *W. W. Niles*, of counsel, for appellant.

*Davies, Work, McNamee & Hilton*, for respondent.

PER CURIAM.—The judgment should be affirmed on the opinion delivered at special term, with costs.

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WILLIAM ARROWSMITH, RECEIVER, &C., PLAINTIFF AND RESPONDENT, v. TIMOTHY O'SULLIVAN, ET AL., DEFENDANTS AND APPELLANTS.

FRAUDULENT CONVEYANCES.—REFUSAL TO FIND.

One who sells goods to a party, after a conveyance by him, presumptively void as against creditors, but before actual change of possession, is a creditor, within the meaning of the statute.

Exceptions to the refusal of a judge or referee to pass upon questions of fact present no questions for review on appeal.

Before CURTIS, Ch. J., and FREEDMAN, J.

*Decided January 6, 1879.*

Appeal by the defendants O'Sullivan and wife, from a judgment adjudging certain sales of O'Sullivan as fraudulent and void.

The action is brought by the plaintiff as receiver, for the benefit of certain judgment creditors of the defendant Timothy O'Sullivan, to set aside as fraudulent conveyances of real and personal estate, executed by him to his wife's brother; and by the latter conveyed to the defendant, Mary O'Sullivan, the wife of the judgment debtor.

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Statement of the Case.

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The said creditors sold defendant the goods, for the price of which their judgments were recovered, after the conveyances in question, but before actual change of possession thereunder.

Upon the settlement of the case, certain questions of fact were presented, and the court was requested by defendant to pass upon them, but refused, because they should not be in such form, and because they were immaterial, or referred to items of evidence rather than to conclusions of fact.

*Henry A. Brann*, attorney, and of counsel, for appellant,—Cited, as to conveyances, &c.: *Babcock v. Ecklen*, 24 *N. Y.* 630 ; *Loeschigk v. Hatfield*, 5 *Rob.* 29 ; *Larremore v. Campbell*, 60 *Barb.* 67 ; *Lee v. Hunton*, *Hoff. Ch.* 457.

*Louis M. Doscher*, attorney, *Stephen B. Bague*, of counsel, for respondents,—Cited, as to conveyances, &c.: 2 *R. S.* 136, §§ 5, 6 ; 1 *Smith's L. C.* (7 ed.) 40 ; *Tillson v. Terwilliger*, 56 *N. Y.* 273 ; *Fielder v. Day*, 2 *Sandf.* 594 ; *Savage v. Murphy*, 8 *Bosw.* 75 ; *Randall v. Parker*, 3 *Sandf.* 69 ; *McCarthy v. McQuade*, 1 *Sweeny*, 387. As to refusals to find: *Code*, § 1023 ; *Van Slyke v. Hyatt*, 46 *N. Y.* 264 ; *Caswell v. Davis*, 58 *Id.* 228 ; *Gove v. Hammond*, 48 *How.* 385.

CURTIS, J., wrote for affirmance, with costs, holding propositions laid down in head-note.

FREEDMAN, J., concurred.

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Statement of the Case.

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JAMES OFFICER, PLAINTIFF AND RESPONDENT, v.  
JOHN J. BURCHELL, IMPLD., &C., DEFENDANT  
AND APPELLANT.

Before CURTIS, Ch. J., and SEDGWICK and FREEDMAN,  
JJ.

*Decided January 6, 1879.*

Appeal by the defendant Burchell, from so much of  
the judgment in foreclosure as charges him with de-  
ficiency.

*Charles A. Jackson*, for appellant.

*William McDermott*, for respondent.

The case involves only questions of fact.

CURTIS, Ch. J., wrote for affirmance, with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

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WILLIAM A. LEONARD, PLAINTIFF AND RESPOND-  
ENT, v. THE N. Y. CENT. & H. R. R. R. CO.,  
DEFENDANT AND APPELLANT.

STATUTORY REPORT OF R. R. Co's.—EVIDENCE.

A copy of report of a railway company to State engineer and sur-  
veyor, in accordance with 2 *R. S.* (6 ed.) p. 534, section 45, subd.  
102; and *Ib.* p. 552, section 99 (duly certified by the deputy  
State Engineer); under 1 *R. S.* (6 ed.) p. 558, section 7; *Ib.* p.  
415, section 7; and *Code. Civil Pro.*, section 933, is competent  
evidence of a material admission made therein by the defend-  
ant as a corporation, with respect to the injury complained of.

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Statement of the Case.

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Before SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal from judgment entered upon the verdict of a jury and from order denying defendant's motion on the minutes for a new trial.

*Frank Loomis*, for appellant.

*Edward Gebhard*, attorney, and *Dewitt C. Brown*, of counsel, for respondent.

FREEDMAN, J., wrote for affirmance of judgment and order, with costs, holding above propositions; also holding that the case below was properly tried, and that none of defendant's exceptions were well taken, under the rulings of the general term, upon the first appeal in this case, when the evidence and authorities were carefully examined (42 *N. Y. Super. Ct.* 225).

SEDGWICK, J., concurred.

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BRICE P. WALLING, PLAINTIFF AND APPELLANT, v. CHARLES H. SCHWARTZKOPF, DEFENDANT AND RESPONDENT.

SALE OF GOODS WITH WARRANTY.—RECOUPMENT.—INDEFINITE PLEADING, REMEDY FOR.

The rule that the acceptance and retention of the goods by the buyer without complaint of defects, after a reasonable time and opportunity for examination has elapsed, is a waiver of all objections to quality, and estops him from recovering damages for defects, applies only to cases of executory contracts without warranty. In case of a warranty, his right to recoup the damages arising from a breach of the warranty survives the

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Plaintiff's points.

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acceptance (Day v. Pool, 52 N. Y. 416 ; Dounce v. Dowe, 57 Id. 16; Marcus v. Thornton, *et al.*, reported *supra*).

Held, that both defendant's counterclaims were good on demurrer. If greater certainty and definiteness were required, the remedy was by motion.

Before SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal from an order, and the judgment entered thereon, overruling plaintiff's demurrer to two counterclaims set up in the answer of the defendant, with leave to plaintiff to reply on the usual terms.

The complaint is for an alleged indebtedness upon an account for milk sold and delivered. This account is not put in issue by the answer, which contains two distinct counterclaims. To these plaintiff demurred on the ground of insufficiency.

The first states a breach by plaintiff of the very contract under which the milk was sold and delivered, the particulars of the breach, and the loss sustained by the defendant thereby.

The second is based upon a breach of warranty. It sets forth the warranty of the milk, its breach, and the particulars thereof, and defendant's loss in consequence thereof.

*J. Stewart Ross*, attorney, and counsel, for plaintiff and appellant,—Cited : Reed v. Randall, 29 N. Y. 358, and cases cited ; Rust v. Eckler, 41 Id. (2 *Hand*), opinion of DANIELS, J., p. 491, and of WOODRUFF, J., p. 494 ; Delafield v. DeGrauw, 42 Id. (3 *Keys*), 467 ; Normington v. Cook, 2 N. Y. *Supm. Ct.* (T. & C.) 423 ; Leavenworth v. Packer, 52 Barb. 132 ; Flanagan v. Demarest, 3 Robt. 173 ; Woodruff v. Peterson, 51 Barb. 252.

*Simon Sultan*, attorney, and of counsel, for re-

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Statement of the Case.

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spondent,—Cited : Lee v. Beebe, 6 *Weekly Dig.* 206 ; Vischer v. Greenbank Alkali Co., 11 *Hun.* 159 ; McKnight v. Devlin, 52 *N. Y.* 399 ; Mount v. Lyon, 49 *Id.* 552 ; *Moak Van Santvoord's Pleadings*, 3 ed. 425 ; Muller v. Eno, 14 *N. Y.* 507 ; Rust v. Eckler, 41 *Id.* 488 ; Day v. Pool, 52 *Id.* 416 ; Parks v. Morris Ax & Tool Co., 54 *Id.* 586 ; Vincent v. Leland, 100 *Mass.* 432 ; Willard v. Merritt, 45 *Barb.* 297 ; *Benjamin on Sales*, §§ 894, 896, 869, 870, 880 ; Wells v. Selwood, 61 *Barb.* 238.

FREEDMAN, J., wrote for affirmance of order and judgment, with costs, with leave to plaintiff, upon payment of such costs and those imposed below, to withdraw his demurrers and serve a reply within twenty days.

SEDGWICK, J. concurred.

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WILLIAM L. DRUMMOND, PLAINTIFF AND APPELLANT, v. GEORGE W. CARLETON, DEFENDANT AND RESPONDENT.

Before CURTIS, Ch. J., and SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal from judgment entered upon the report of a referee dismissing plaintiff's complaint upon the merits, with costs.

*Wm. A. Copp*, for appellant.

*Edmund Coffin, Jr.*, for respondent.

This case involves only questions of fact.

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Statement of the Case.

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PER CURIAM.—The judgment should be affirmed with costs, on the opinion of the referee.

JOHN S. ROSS, PLAINTIFF AND APPELLANT, v.  
ELIZABETH HARDEN, ADM., DEFENDANT AND  
RESPONDENT.

Before SEDGWICK and FREEDMAN, JJ.

*Decided January 6, 1879.*

Appeal from judgment, dismissing complaint on trial by jury.

*G. W. Lord, Moak & Lyddy*, for appellant.

*John E. Burrill*, for respondent.

PER CURIAM.—The judgment should be affirmed, upon the opinions given, on the decision by two former general terms, in March, 1876, and November, 1877 (42 *Sup'r Ct.* 427, *ante*, p. 26).

Judgment affirmed, with costs.

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HERBERT B. FREEMAN, PLAINTIFF AND RESPONDENT, v. JOHN M. FALCONER, DEFENDANT AND APPELLANT.

I. RE-ARGUMENT.

1. WHEN ORDERED.

- (a) When the former decision is based in part on a decided case, which has subsequently been reversed by the court of appeals.\*

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\* NOTE.—For the opinion delivered on the first argument, see *ante*, p. 132.



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Opinion of the Court, by CURTIS, Ch. J.

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CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

*Decided March 3, 1879.*

Motion by appellant for a re-argument of the appeal herein.

*Abner C. Thomas*, for appellant.

*C. F. Wells*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The defendant is sued as one of the makers of two promissory notes by the indorsee. The defense is, that the payees of the notes own them, and that they are the real parties in interest and not the plaintiff, and that his possession of them is merely as their agent to collect them and remit the proceeds. At the trial the defendant offered to show this, but it was excluded by the court, and there was a verdict for the plaintiff.

The defendant appealed from the judgment entered upon the verdict and from the order denying a motion for a new trial. The judgment and order were affirmed upon appeal. The opinion of the court to some extent rested upon the decision of *Hayes v. Southgate* (10 *Hun*, 511). Since then, the latter case has been before the court of appeals and reversed (18 *Alb. L. J.* 318). In view of this and of the decision in *Taylor v. Sarget* (6 *Weekly Dig.*), the appellant's motion should be granted.

SEDGWICK and FREEDMAN, JJ., concurred.

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Statement of the Case.

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WILLIAM F. BONYNGE, PLAINTIFF AND APPELLANT, v. DAVID DUDLEY FIELD, ET AL., DEFENDANTS AND RESPONDENTS.

STENOGRAPHERS.—ATTORNEYS' LIABILITY FOR SERVICES OF.

This action was brought by the plaintiff, a stenographer, to recover the value of services alleged to have been rendered by him at defendant's request, &c., in taking minutes of testimony, &c., in certain legal proceedings in which defendant appeared as attorney for one of the parties thereto.

*Held*, that the defendant being the agent of a known principal, did not incur a personal liability by simply requesting the performance of such a service for his client, and also that there was no evidence in the case of an agreement on his part to be liable therefor, nor anything from which it could be safely said that it was the intention of the parties that the defendants should be so responsible (*Bonynge v. Waterbury*, 12 *Hun*, 534 ; and *Sheriden v. Genet*, *Id.* 660, followed).

Before VAN VORST and SPEIR, JJ.

*Decided March 3, 1879.*

Appeal from judgment dismissing the complaint.

*Bushnell & Albright*, attorneys, and *S. Jones*, of counsel, for plaintiff and appellant.

*Charles F. Bauerdorf*, for defendant and respondent.

VAN VORST, J., wrote for affirmance, with costs, holding the proposition laid down in the head-note.

SPEIR, J., concurred.



# INDEX.

## ACCORD AND SATISFACTION.

1. A plaintiff's attorney made a stipulation, signed by him alone, whereby he agreed to accept, in settlement of a judgment held by his client, goods to a certain amount, to be delivered by the judgment debtor to the judgment creditor, or on his order, and upon delivery of goods to the specified amount, then to take, for the balance of the judgment, an assignment, by the judgment debtor, of his interest in a certain patent, and the assets of such patent business; the judgment debtor, after having delivered goods to the specified amount, tendered an assignment of the patent and of the assets of the business, which the judgment creditor refused to accept. *Held*, not an accord and satisfaction of the judgment. If in above put case the judgment creditor had accepted the assignment, there would have been an accord and satisfaction. *Kromer v. Heim*, 287.
2. In above put case the stipulation was held not to be a substituted agreement, because the defendant, being under no obligation to do anything whatever under it, there was no consideration for it, and the plaintiff had no right of action on it. *Ib.*
3. When a holder of promissory notes accepts, from the maker, less than their face, and surrenders the notes to the maker, there is a complete accord and satisfaction, and the maker is discharged from all liability on the notes and on the indebtedness for which they were given. *Babcock v. Bonnell*, 568.

## ACCOUNTING.

See COSTS AND ALLOWANCES, 2, 3;  
LIMITATION OF ACTIONS.

## ACCOUNT STATED.

1. To make an account stated there must be a mutual agreement, a meeting of minds between the parties to it, as to the allowance or disallowance of their respective claims, and there must be proof of assent to the account as rendered, and to the balance appearing to be due (*Stenton v. Jerome*, 54 N. Y. 480; *Lockwood v. Thorne* 18 Id. 285). *Held*, that in this case all the essential elements of an account stated seem to be wanting. *Volkenning v. De Graaf*, 424.
2. *Held*, that plaintiff's rights, if any he had, were not enforceable in this form of action; and he, not having stated his true cause of action, and having failed to prove the one alleged, the complaint was properly dismissed. It was not a variance, but a failure of proof (*Code*, § 171; *Code of Civ. Pro.* § 541; *Bernard v. Seligman*, 54 N. Y. 661; *Barnes v. Quigley*, 59 Id. 265). *Ib.*

## ACTIONS.

See BANKS AND BANKING, 1, 2.

## ADMISSIONS.

See EVIDENCE, 1, 7, 11.

## AFFIDAVITS AND DEPOSITIONS.

See EXAMINATION BEFORE TRIAL.

## AGENCY.

1. The general rule is that if an agent, in the course of his agency, signs a bill in his own name, he is liable, and his principal is not (*Rogers v. Coit*, 6 *Hill*, 822; *Crocker v. Colwell*, 59 *N. Y.* 213). *Johnson v. Richard*, 16.
2. Section 2, page 768, 1 *R. S.*,—which provides that “every note signed by the agent of any person under a general or special authority, shall bind such person,”—refers to a note which upon its face appears to have been signed by an agent, and does not refer to a note so signed by an agent that, under the general rule, he becomes liable. *Ib.*
3. The case of *Engl v. Greenebaum* (2 *Hun*, 136), must be read and considered with reference to the facts of the case. It holds a defendant liable as a principal upon a bill signed by the agent personally, yet within his authority as an agent, and that a violation by an agent of private instructions given to him by his principal, does not absolve a principal from his responsibility, provided the act of the agent is within his authority. *Ib.*
4. In this case, if the defendants received the money to be transmitted to Liverpool, for the use of the holder of the bill—that is, to put the drawer in funds to pay the bill; the holder could recover of the defendants if they did not transmit the money. On examination and consideration of the testimony in the case, the court held that it did not appear that the money was so received, and the judgment was reversed on that ground. *Ib.*
5. Trustees for holders of railroad mortgage bonds, in possession of and operating the railroad, do not fall within the exception from the rule *respondet superior*, accorded to an employer occupying a representative or official character. *Faulkner v. Hart*, 471.

See BANK AND BANKING, 4;  
BROKERS; CONTRACTS, 7;  
STENOGRAPHERS' FEES.

## ALIENS.

1. The inheriting by aliens is governed by the law in force at the time of the death of the person from whom they claim to inherit. Only those who at the time of the death are entitled under the then existing law are capable of taking by descent. The disqualification does not rest on lack of inheritable blood, but on a lack of right to inherit, for the reason that the alien is not a citizen or subject of the government where the land lies. *Renner v. Müller*, 535.
2. In regard to alienage as affecting taking by descent from a native born or naturalized citizen dying between April 15, 1857, and April 27, 1874:—alienage of claimant does not prevent following persons from taking by reason thereof: 1. Resident children born in foreign countries of persons then aliens, but who afterwards are duly naturalized; such children being under the age of twenty-one years at the time of the naturalization of their parents. 2. Children of certain citizens, though born out of the limits and jurisdiction of the United States. 3. The foreign-born widow and children of aliens dying during the interval between their application and actual naturalization, upon their taking the oaths prescribed by law. 4. A free, white alien woman who, prior to such death, shall have lawfully intermarried with a citizen. This, whether her husband be a native-born or naturalized citizen. If naturalized, the fact that he was naturalized after the marriage does not alter the case. This, though the woman at the time of marriage was not twenty-one years of age, provided she was over twelve. This, though the woman had never been within the United States. *Ib.*
3. The fact that the claimant is obliged to trace descent through a deceased alien ancestor, will not preclude him from inheriting. Alienage of such ancestor does not enable one to take by descent as his representative, as if he were deceased. Ancestor, with respect

to this subject, includes both lineal and collateral ancestors. *Ib.*

4. Brothers and sisters, children of an alien parent, inherit of each other. The parent, though living, is by reason of his alienage passed by, and the descent between the children is immediate. *Ib.*

5. Treaty between kingdom of Wurtemberg and the United States, allowing citizens of either party, to whom land would have descended under the laws of the other but for alienage, to sell the same and withdraw the proceeds under certain restrictions; the rights of the alien claimant in this case under this treaty are not clear, and should be reserved for decision until the trial of the cause. *Ib.*

6. *L.* 1868, chapter 513; *L.* 1874, chapter 261; *L.* 1875, chapters 38, 336; *L.* 1877, chapter 111, are not applicable to above case, because not in existence when rights became vested by the death. The Revised Statutes, 1880, chapter 171; 1843, chapter 87; 1845, chapter 115; 1857, chapter 576, are not applicable, because their operation, so far as this question is concerned, is confined to lands left by a resident alien, except first section of the act of 1843, which is confined to lands which had been purchased and conveyed, or had been devised, or had descended, prior to its passage. *Ib.*

See INJUNCTION, 3.

#### AMENDMENTS.

See APPEAL, 1.

#### APPEAL.

1. An appeal will not lie from conditions on which leave to amend pleading is granted. The whole order should be appealed from. *Havemeyer v. Havemeyer*, 170.

2. Exceptions to unnecessary proof, even if good, are not cause for reversal. *Mundorff v. Wangler*, 495.

3. Error in reception of incompetent evidence not cause for reversal. Rule, that when such

error could not possibly have worked injury, there is no cause for reversal, not applicable to the case at bar. *Branch v. Levy*, 507.

4. Rule, that admission of evidence incompetent, but not working any injury, is not cause for reversal, applies, when the evidence is as to facts which, if not testified to, the jury would know, from an experience common to all, must have existed. *Menard v. Stevens*, 515.

5. A refusal to comply with a request to charge a perfectly correct proposition is not error, if it has no bearing on the issues involved. *Ib.*

6. The appeal is from the judgment only, and not from the order denying a motion for a new trial on the judge's minutes. In order to bring up the case for review upon the facts there must be an appeal from the order denying the motion for a new trial. The mere denial of a motion made upon the judge's minutes presents no question of fact for review upon appeal from the judgment. The appeal should be from an order denying such motion, and exception taken thereto, if the facts are to be reviewed (*Matthews v. Mayburg*, 63 *N. Y.* 656). On the other hand, if it be claimed that the order denying such motion is an intermediate order, involving the merits and affecting the judgment, the New Code requires that, before it can be reviewed upon an appeal from the judgment, it must be specified in the notice of appeal (§§ 1801, 1816). Questions of law, therefore, only are to be considered. *Am. Med. Co. v. Keisler*, 557.

7. Exceptions to the refusal of a judge or referee to pass upon questions of fact present no questions for review on appeal. *Arrowsmith v. O'Sullivan*, 578.

When appeal does not prevent amendment of judgment. See *McKelvey v. Lewis*, 561.

See COSTS AND ALLOWANCES, 1; RECEIVERS.

## ARREST.

False statements made by a party in regard to the solvency and pecuniary resources of his firm, for the purpose of obtaining credit on the purchase of goods for said firm, and with the intent to cheat and defraud the party from whom the goods are purchased, when sufficiently averred in a pleading or affidavit, are sufficient to sustain an action on the case for fraud and deceit against the party making such false statements (*Stitt v. Little*, 63 *N. Y.* 427), and, uncontroverted, they show the debt to have been fraudulently contracted, and for the fraud thus perpetrated the partner by whom the false representations are made, if not others who profited by the transaction, can be lawfully arrested and held to bail (*Sherman v. Smith*, and cases therein cited, 42 *How. Pr.* 198). *Witmark v. Herman*, 144.

## ATTORNEY AND CLIENT.

See STENOGRAPHERS' FEES.

## BANKS AND BANKING.

1. In an action based on the statute for the recovery of money invested or used in violation of the prohibition in charter of savings banks, against investing money deposited, except upon certain specified securities, and against the president, vice-president, any trustees, officers or servants directly or indirectly borrowing the funds of the corporation, its deposits, or in any manner using the same or any part thereof, except to pay necessary current expenses under the direction of board of trustees—constitutive facts are: that there was a violation; that defendant is one of the parties falling within the purview of the prohibition; and that he authorized, or was a party to, the violation. What are not: that the money invested or used has not been repaid; that a demand has been made on the borrower; that the money has been lost, either through the inadequacy of the security or the in-

solvency of the borrower, or otherwise. *Knapp v. Roche*, 247.

2. Loaning money on promissory notes, cashing checks, or permitting a depositor to overdraw his account is a violation of the above prohibition. *Ib.*
3. In reply to a statement made by the book-keeper to defendant "that the bank had to make up its bank account, and those checks" (referring to checks given for an unauthorized loan to C.), "must be got out of the way," and he would make it a call loan to the defendant (the vice-president and a trustee), the defendant said, "Do whatever you please. Charge it to C.:"—*Held*, not a ratification whereby the defendant could be made liable on account of the loan. *Ib.*
4. In this case plaintiff intrusted to her husband a bond belonging to her, to be deposited in the German Savings Bank for safe keeping, which bond he thereupon took to said bank with plaintiff's bank book, and delivered to the cashier, who placed the bond in the bank safe, and wrote the following memorandum and attached it to said bank book, and returned the same to defendant's husband: "Mrs. Anna Zugner, Morrisania Steamboat Co., No. 1, Bond \$1,000, August 20, 1873." *Held*, that the said transaction was had with the cashier as an officer of the bank in the line of his duty, and that the bank recognized, and was charged with notice of plaintiff's title to the bond. There was other evidence in the case of notice to the bank's trustees of plaintiff's title. Also, that a subsequent transfer of the bond to the bank by plaintiff's husband was void. *Zugner v. Best*, 893.

## BILL OF LADING.

See COMMON CARRIER, 1.

## BILLS, NOTES AND CHECKS.

1. Section 2, page 768, 1 *R. S.*,—which provides that "every note signed by the agent of any person under a general or special author-

ity, shall bind such person,"—refers to a note which upon its face appears to have been signed by an agent, and does not refer to a note so signed by an agent that, under the general rule, he becomes liable personally. *Joynson v. Richard*, 16.

2. In the absence of *mala fides* in a plaintiff's possession of promissory notes, indorsed in blank, or specially to himself, or his own order, the legal title is in him, and he is legally the real party in interest, and can maintain an action on the same, even though it appears that the transfer is merely colorable as between the parties (See cases cited in *Hays v. Southgate*, 10 *Hun*, 511; also *Sheridan v. City of New York*, Court of Appeals, see 4 *N. Y. Weekly Dig.* 28). *Freeman v. Falconer*, 132.

3. The settlement of a litigation is a sufficient consideration for notes given in pursuance of, and to effect the settlement. *Feeter v. Weber*, 255.

What constitutes defense to notes given in settlement of litigation. See *Feeter v. Weber*, 255.

See ACCORD AND SATISFACTION, 3; CONSIDERATION; PLEADING, 2; STATUTE OF FRAUDS.

#### BOARD OF EDUCATION.

See *N. Y. City*, 1-3.

#### BOND.

Administrator's bond, liability of surety thereon. See *Murdorf v. Wangler*, 495.

#### BROKERS.

1. A sold note signed by the brokers stated the parties on whose account the sale was made, and then contained the following: "Send invoice and bill of lading to our office. Collect at our office." Held, not authority for payment by the vendees to the brokers. *Harrison v. Ross*, 230.
2. Plaintiff's assignors, who were stock-brokers, purchased stock for defendant on a margin, and carried the same. Their request for more margin being disre-

garded, three days after making the same, they sold the stock, without notice to defendant, which sale he refused to accept, and thereafter sent defendant an account showing a balance thereon against him, for which this action is brought. Held, that the relation between said brokers and defendant being that of pledgee and pledgor, the sale of the stock without notice to defendant was an act of conversion, that debars plaintiff from maintaining this action. Also held, that a subsequent offer by said brokers of stock to replace that improperly sold, was nugatory (see cases cited in opinion). *Gru-man v. Smith*, 389.

3. It is true, as a general rule, that when a contract of sale has been effected and concluded by parties through the agency of a broker, that the broker's memorandum of sale, and the bought and sold notes, constitute the evidence of the contract, and no parol evidence is admissible to vary the same. But when (as in this case) it is a contested question of fact whether or not the sale was effected and concluded through the agency of a broker, that question should be submitted to the jury. *Marcus v. Thornton*, 411.

#### BURDEN OF PROOF.

See LEASE, 2.

#### CHARTER OF VESSEL.

See DAMAGES, 4.

#### CHoses IN ACTION.

See GIFT, 4; HUSBAND AND WIFE, 2.

#### CODE OF CIVIL PROCEDURE.

§§ 870 to 886, 772, 17. *Levy v. Leeb*, 291.  
 § 837. *Corbett v. De Comeau*, 306.  
 § 451. *Freeman v. Barrow*, 313.  
 §§ 872, 886. *Dunham v. Merc. Ins. Co.*, 387.  
 § 541. *Volkensing v. De Graaf*, 424.  
 § 910. *Butler v. Flanders*, 581.  
 §§ 1301, 1316. *Am. Med. Co. v. Keisler*, 557.



§ 933. *Leonard v. N. Y. C., &c. R. Co.*, 575.

#### CODE OF PROCEDURE.

§ 310. *Cornwall v. Mills*, 45.  
 §§ 375 to 381, 136. *Freeman v. Barrowcliffe*, 313.  
 § 309. *Hinman v. Ryder*, 330.  
 § 171. *Volkering v. De Graaf*, 424.  
 § 428. *Renner v. Muller*, 535.

#### COMMISSION TO TAKE TESTIMONY.

It appears, upon the face of the commission, that the witness examined under it, on behalf of plaintiff, was, prior to his examination, furnished by plaintiff's attorney with copies of the interrogatories and cross-interrogatories to be administered to him. No prejudice is shown to have accrued to defendant therefrom, save what may be inferred from the receipt by the witness of both sets of interrogatories, nor did any intention appear, on the part of plaintiff's counsel, to secure an unfair advantage over defendant. *Held*, that the deposition should stand, and that the fact of the receipt of the interrogatories should only affect the credibility of the witness, and the weight of his testimony. Also, that defendant must have leave to frame and administer further cross-interrogatories, and that if he elect so to do, the commission must be returned at the sole expense of the plaintiffs. *Butler v. Flanders*, 531.

#### COMMON CARRIER.

1. Plaintiff shipped certain goods upon one of defendant's steamships, under a bill of lading containing the following clause:—"Goods to be taken by consignee immediately, &c., otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk, &c., in the warehouse provided for that purpose, or sent to the public store, as the collector of the port shall direct, &c. &c." Upon the arrival of the vessel, defendant

notified the consignee that said goods were upon its (defendant's) dock, and that they must be removed during the day: that the company would no longer be responsible for them. They were not removed, and remained there during the next day, at which time a portion of the same were stolen, without negligence on the part of defendant. *Held*, that the defendant was liable, under the above clause of the bill of lading, for damages for non-delivery. *Thompson v. The Liv. S. S. Co.*, 407.

2. In a case where the shipper must be deemed to know the usage of the carrier in delivering freight at the place of destination, and the law of that place in respect to it, and the inference from the evidence is in conformity with the view that the original contract called for, and the shipper contemplated a delivery in accordance with the usage and law prevailing at that place, the facts are not of a character to appeal very strongly to the courts of this State to give the parties a remedy in conflict with the law of that place, as defined by its courts. *Faulkner v. Hart*, 471.

See MASSACHUSETTS LAW.

#### COMPLAINT.

Construction of, on appeal. See *Sparrmann v. Keim*, 163.

Where complaint, framed so as to apparently include either cause of action on contract or in tort, will be deemed by general term to contain only cause of action in tort. See *Id.*

ACCOUNT STATED, 2; TRIAL, 2, 3.

#### CONDITIONS SUBSEQUENT AND PRECEDENT.

See INSURANCE, 4, 5, 6.

#### CONSIDERATION.

When a note is given for the purchase price of goods, and the goods while in transitu are stopped by the vendor, who takes possession thereof and sells them, the

consideration for the note fails, and as between the original parties the maker is discharged from all liability thereon, and on account of the purchase. *Babcock v. Bonnell*, 568.

See ACCORD AND SATISFACTION, 2 ;  
BILLS, NOTES AND CHECKS, 2, 3 ;  
CONTRACTS, 1-3 ; LANDLORD  
AND TENANT ; STATUTE  
OF FRAUDS.

### CONSTITUTIONAL LAW.

1. A statute which so affects the remedy existing at the time the contract was entered into as to substantially impair and lessen the value of the contract, impairs the obligation of the contract, and is forbidden by the constitution, and is therefore void. *Jessup v. Carnegie*, 260.

2. The obligation of contracts can no more be impaired by subsequent judicial decisions on the construction of a statute, than by subsequent legislation. *Ib.*

See DEATH, ACTION FOR, &c., 3.

### CONTRACTS.

1. A contract, such as is alleged in the complaint in this case, as having been made between the plaintiff and defendant's intestate, is void as between the parties to it, for want of consideration and mutuality, and as conflicting with the settled policy of the law which governs and controls the transmission and devolution of the estates of deceased persons, and the custody of such estates, upon and after the decease of their original owners (see the opinion of the court). *Ross v. Harden*, 26.

2. An agreement to reduce the rent reserved by a lease for the balance of the demised term thereafter to ensue, requires a new consideration. *McMaster v. Kohner*, 253.

3. The settlement of a litigation is a sufficient consideration for notes given in pursuance of, and to effect the settlement. *Peeter v. Weber*, 255.

4. The rights, liabilities, and obligations of parties to a contract

made and to be performed in this State, the parties on one side being all citizens of New York, and on the other not citizens of Iowa, so far as affected by the statute laws of Iowa, must be determined according to the interpretation and construction of the statute as expounded by the courts of Iowa at the time of the making of the contract. This, although the then exposition has been by subsequent decision reversed. *Jessup v. Carnegie*, 260.

5. The obligation of contracts can no more be impaired by subsequent judicial decisions on the construction of a statute, than by subsequent legislation. *Ib.*

6. A statute which so affects the remedy existing at the time the contract was entered into as to substantially impair and lessen the value of the contract, impairs the obligation of the contract, and is forbidden by the constitution, and is therefore void. *Ib.*

7. The agreement of plaintiffs to use their best efforts, and at their own expense, to collect the claim "in the shortest practicable time," did not specifically provide for the duration of time through which plaintiffs were bound to make efforts, and it was also doubtful whether there was any implied obligation upon the defendants not to empower another agent in the same business. Assuming, however, that the contract created such an obligation, there was no time specified in the contract in which plaintiffs had the right, and should be allowed to act as sole agents for the defendants. Therefore, a reasonable time, under the contract, for each party must be allowed ; that is, a period to be fixed according to the circumstances, for the plaintiffs to collect the claim and the defendants to forbear the employment of other agents, and after the expiration of that period the defendants had the right to employ other agents and proceed in the collection of the claim. *Held*, that under the facts in this case that reasonable time had expired, and defendant's action in

the employment of other agents and in the collection of the claim, was justifiable under the contract. This limitation as to time was a part of this contract, as matter of law. The power contained in the contract was not revocable, because of the lapse of time, but it simply expired with the expiration of a reasonable time or period, which the plaintiffs had under the contract to collect the claim. *Lawson v. Bachman*, 896.

8. The rule that the acceptance and retention of the goods by the buyer without complaint of defects, after a reasonable time and opportunity for examination has elapsed, is a waiver of all objections to quality, and estops him from recovering damages for defects, applies only to cases of executory contracts without warranty. In case of a warranty, his right to recoup the damages arising from a breach of the warranty survives the acceptance (*Day v. Pool*, 52 *N. Y.* 416; *Dounce v. Dowe*, 57 *Id.* 16; *Marcus v. Thornton, et al.*, reported *supra*). *Walling v. Schwartzkopf*, 576.

When the courts of this State will apply the law of another State as to what constitutes due performance of common carriers contract as to delivery, &c., said contract having been made in this State. See *Faulkner v. Hart*, 471.

See BROKERS, 8; COMMON CARRIER; CORPORATIONS, 8, 6; COVENANTS; DAMAGES, 4-7; DEEDS; EXECUTORS AND ADMINISTRATORS, 1-3; INSURANCE, 4; MARRIED WOMEN, 2; PARTNERSHIP, 6; SALE; STATUTE OF FRAUDS.

#### CONVERSION.

1. Liability incurred by a sheriff in the taking and detention of property cannot be discharged by any act of his own, without the assent of the owner of the property. A return of the property, without such assent, will not release the sheriff, nor will a subsequent levy and sale under process in favor of the sheriff afford him any protection as against the first unlawful

taking (see numerous cases cited in the opinion of the court). *Parker v. Conner*, 416.

2. But, as an exception to the above general rule, it is equally well-settled, that if the property be taken again from the trespasser, without his agency or connivance, and by the act of a third person and the operation of law, and applied to the owner's use, although without the latter's consent, the jury, in estimating the damages of the owner, may take into consideration, as mitigation of the same, such a taking of the property and its application to the owner's use and benefit. Such application is held to be equivalent to a return of the property, and its acceptance by the owner (see cases cited by the court). It is not the fact of the subsequent seizure that gives this defense, but that it has been seized under such circumstances that the owner has had or could have the benefit of it (*Bull v. Liney*, 48 *N. Y.* 6). It matters not whether such mitigating circumstances occurred before or after the commencement of plaintiff's action (*Dailey v. Crowley*, 5 *Lans.* 301). *Id.*

3. Defendant offered to show that the plaintiffs had recovered in another action a verdict, including a demand of some of the property named in this action. The offer was not for a recovery of the same property. There was no offer to show that satisfaction had been obtained on the judgment, or that plaintiffs had made their election by suing out execution. *Held*, inadmissible (*Osterhout v. Roberts*, 8 *Conn.* 43; *Livingston v. Bishop*, 1 *Johns.* 290). *Am. Med. Co. v. Keisler*, 558.

See BROKERS, 2.

#### CONVEYANCES TO HINDER AND DELAY CREDITORS, &c.

1. The statute in relation to conveyances to hinder and defraud creditors, &c., 2 *R. S.* 137, §§ 1, 5, does not contemplate that the title of a purchaser for value shall be impaired, unless the notice of

fraudulent intent on the part of the vendor is a notice *previous* to the perfecting of the sale. The statute specifies in such case, that the notice shall be a "previous notice," but the plaintiff, in his request, omitted the word "previous," and there was no error in the court declining to so charge, and charging the modification which was sound as a statement of law. *Gottberg v. Conner*, 554.

2. One who sells goods to a party, after a conveyance by him, presumptively void as against creditors, but before actual change of possession, is a creditor, within the meaning of the statute. *Arrowsmith v. O'Sullivan*, 573.

See INJUNCTION, 1.

#### CORPORATIONS.

1. Doctrines relating to *de facto* by user, corporations, are not applicable where a corporation is sought to be formed under the provisions of a general law. *Jessup v. Carnegie*, 260.
2. Under general statutes existing in Iowa in 1871, relating to the formation of corporations other than railroad corporations, prerequisites to a legal corporate existence are recording of articles of incorporation in the office of the recorder of deeds of the county where the principal place of business is to be, in a proper book kept therefor; and within three months thereafter, filing with secretary state copy articles, and publishing a certain prescribed notice for four weeks in succession in some newspaper as convenient as practicable to the principal place of business. *Ib.*
3. Body assuming to be corporation, without legal corporate existence, associates in forming, and stockholders in the proposed company are liable as copartners upon contracts made in the name adopted as its corporate name. This, although the parties dealing with the proposed company believed it to be a corporation, and dealt with it as such. This, although the associates and stockholders

did not intend to become copartners and liable as such. *Ib.*

4. Liability of the stockholders for the debts of an incorporation formed to navigate the ocean by steamships (statute of 1852, 2 R. S. 6 ed. 718), is incurred the moment the contract of the creditor with the company is consummated (*Corning v. McCullough*, 1 N. Y. 47; *Aspinwall v. Sacchi*, 57 Id. 831). *Mills v. Hicks*, 527.
5. In above case, the statute of limitations begins to run when the plaintiff has the right to bring his action under the clause of section 8, viz.: "And no suit shall be brought against any stockholder in such corporation, for any debt so contracted, until an execution shall have been returned unsatisfied in whole or in part." And in case of the sheriff's failure to return it (at the end of sixty days), then the return of it as procured by proceedings taken by the creditor within a reasonable time after the failure of the sheriff to return, shall be deemed the time referred to in the statute. The statute begins to run at the lapse of such reasonable time without the creditor taking any proceedings to compel return. *Ib.*
6. In an action brought to recover for services from Dec. 1, 1874, to June 22, 1878, as a general banking clerk and French correspondent, at a stipulated compensation, the answer denied all the allegation of the complaint, except that defendant was an association. Plaintiff, by his own testimony showed that one of the directors employed him as French correspondent and general clerk, at a certain salary per month; that the company was doing no business; that it was understood he was first to make a telegraphic code, and when business came he was to be French correspondent and to do all the work which would be given him; that he was set at work on a telegraphic code for the company; that all the officers of the company knew he was at work on this code: that there was a slip prepared for entry in the book in which all the

salaries to April 1, 1875, including his own, was entered: that every director of the company at that time had seen the slip, that the secretary had frequently told him the amount of his salary, that the making a telegraphic code was no part of his duty as banking clerk or French correspondent. *Held*, sufficient to support a direction for a verdict in plaintiff's favor. *Legrand v. Man. Merc. Ass.* 562.

See ESTOPPEL, 4; PRINCIPAL AND SURETY, 1.

### COSTS AND ALLOWANCES.

1. Phrase in "on payment of costs of the action to the present time," in an order allowing amendment of pleading, means such costs as would go to the party against whom the amendment is allowed, in case there had been a termination, favorable to him, at the date of the order granting leave to amend. Such costs must be taxed, and if improper items are allowed the remedy is by appeal from the taxation. *Havemeyer v. Havemeyer*, 170.
2. The bare fact that an action is brought for an accounting between partners, and a division of the partnership assets, is no ground for the granting of an extra allowance. In such case the element that the action is difficult and extraordinary, must exist, to authorize an allowance. *Hinman v. Ryder*, 330.
3. Where, if the action (partnership accounting, &c.) is difficult and extraordinary at all, it is so by reason of issues joined on charges of misconduct and bad faith made by plaintiff against defendant, and those charges are subsequently abandoned, an extra allowance cannot be granted to the plaintiff. *Id.*

### COURTS.

See JURISDICTION; U. S. LAW.

### COVENANTS.

1. In this case there was a covenant against erecting a building within a certain distance of the front line

of premises, and erecting certain specified buildings, among them a livery stable or private stable,—*Held*, that the erection, on the greater part of the reserved space, of a porch 16 feet 8 inches wide, extending to the front line of the premises, with bay-windows on each side, having their foundations on the ground, and rising therefrom five stories high, and approaching within a few inches to the said front, the same constituting a part of a large building erected, as to this part on the reserved space, and as to the residue on land in the rear, is a breach of such covenant. *Du Bois v. Darling*, 436.

2. The bare fact that the common grantor (one of the parties to the original agreement) of the plaintiff and defendant, maintained a private stable on the lot subsequently conveyed to defendant, on which he erected the porch and bay-windows above referred to, and which adjoined the lots previously conveyed to plaintiff, and that the stable remained thereon until removed by defendant, without any interference by plaintiff, will not amount to abandonment, or waiver, of covenant, or estoppel against enforcing same. Nor will the mere standing by and seeing an owner of another lot, subject to the same easement, build, without objection, a bay-window overhanging the restricted space. The fact that the plaintiff himself attached an iron balcony to the front of his house, projecting 3 feet 4 inches over the reserved space, said attachment not being intended as an evasion of the covenant, or made otherwise than with a belief of a right to do so, will not amount to such waiver or estoppel, &c., &c. But acts of plaintiff which are of a character to lead, and have led others to treat the servient estate as if free from the servitude, will amount to waiver, &c., &c., as to those who have acted on the faith thereby induced, that the servitude was abandoned. *Id.*

See LEASE, 1; MORTGAGES, 1-8.



## DAMAGES.

1. The plaintiff in this case was severely injured about the head and face by blows received, as stated in opinion. A verdict of \$1,000, — *Held*, not excessive. *Hendricks v. Sixth Ave. R. R. Co.*, 8.
2. In this case plaintiff rendered certain services, extending over a few days, in and about the custody and safekeeping of certain securities, &c., of defendant's intestate after his decease, the same being of the value of \$1,200,000. *Held*, a verdict for plaintiff of \$10,414.72, was excessive. *Ross v. Harden*, 26.
3. The court below charged, as to damages, that the jury had "a right to consider the nature of plaintiff's business, its extent, and the time he was prevented from attending to the same." *Held*, correct. *Clifford v. Dam*, 391.
4. In the case of the charter of a steamboat to be used in the excursion business on the Hudson River, and other specified waters, at a specified sum per week, a breach thereof was alleged and established as against the owners, the defendants, who took possession of the steamboat and deprived the plaintiffs of the same. *Held*, as to the question of damages, that unearned and speculative profits cannot be included as a part of the damages to be recovered (*Wehle v. Haviland*, 69 *N. Y.* 451). The rule of damages in favor of the plaintiff in this case is, 1. The market value of the charter, with its limitations and conditions for its unexpired term. 2. Or the difference (if any) between the price named in the charter and the price that plaintiffs would have to pay in order to hire another equally good steamboat for the business, with a suitable compensation for the plaintiffs' time, trouble and expense in obtaining such other boat. 3. Or the difference between the price to be paid by plaintiffs under the charter, and the market value of the use of the boat, through the unexpired term

of the charter, for the excursion business, if there was such a value (*Blanchard v. Ely*, 21 *W.* 342; *Clark v. Maugha*, 1 *Den.* 317; *Griffin v. Colen*, 16 *N. Y.* 491; *Rogers v. Beard*, 86 *Barb.* 31; *Cassidy v. Le Fever*, 45 *N. Y.* 562; *Allen v. Fox*, 51 *Id.* 562). The offer of plaintiffs to prove what would have been the profits of an excursion business, carried on with the steamboat in question, on objection, was properly overruled. The offers of plaintiffs to prove, 1. That there were opportunities to charter the boat for excursions, &c. 2. What was the market value of a boat of that kind for excursions, &c.; and in connection with this testimony to show the daily expense of running the boat, claiming that the evidence thus offered would show profits, &c., were improperly excluded, because this evidence would have properly established the market value of the use of the boat for the unexpired term of the charter. *Mitchell v. Cornell*, 401.

5. Such damages only are recoverable as the parties either actually contemplated, or may be fairly supposed to have contemplated, as flowing from the breach. *McCull v. West. Un. Tel. Co.*, 487.
6. Where the damage claimed is a loss of that which might have been obtained, depending on the contingency of a certain expected action of a third party in the event of the contract being carried out, it is too remote to be regarded as within the contemplation of the party breaking the contract. *Id.*
7. When, by contract between S. and M., it was agreed that M., for a certain specified period should occupy a certain part of a building of S., and carry on therein a certain business in connection with a certain other business carried on by S. in the rest of the house, and that M. should receive all the profits of his business:—*Held*, in an action by M. against S. for a breach of the contract in ousting him from his part of the building, that evidence of the profits made by him prior to the breach was

admissible on the subject of damages. The tendency of the evidence to form a basis for an improper allowance of subsequent profits must be guarded against by the charge. The nature and extent of the business done before breach, the contingencies to which that business was subject, the expenses incurred, the profits made, and losses sustained, and the admissions made by M. in regard thereto, are all to be considered in determining what the use and occupation of the demised premises in the condition in which they were at the time of the breach, including the furniture in them, would have been worth to M. for the purposes mentioned in the lease, for the time he was deprived of it by the unlawful acts of S. *Menard v. Stevens*, 515.

See CONVERSION, 1, 2; DEATH, ACTION FOR, &c., 1-8; MASTER AND SERVANT, 2; SLANDER AND LIBEL, 2; TELEGRAPH CO'S.

#### DEATH, ACTION FOR CAUSING.

1. The statute requiring compensation for causing death by wrongful act, or neglect or default (*Laws of 1847*, chap. 450, amended 1870, chap. 78) does not limit the recovery to the actual pecuniary loss proved on the trial (*Ihl v. Forty-second St. and Grand St. Ferry R. R. Co.*, 47 *N. Y.* 317, and cases there cited). *Cornwall v. Mills*, 45.
2. Very slight evidence of pecuniary injury or loss is sufficient to warrant the submission of a case to a jury, who are thereupon to award "such damages as they shall deem a fair and just compensation therefor;" and if the jury is satisfied that pecuniary injury resulted from the death, they are at liberty (within the statutory limitation) to fix the compensation according to their sense of justice and right. *Ib.*
3. The direction in this statute to the effect, that the damages recovered in such an action shall draw interest from the time of the

death of such deceased person, and shall be added to the verdict, and inserted in the entry of judgment, is not in conflict with the constitution. *Ib.*

4. *Held*, in this case, that the intent of the legislature was that this statute,—i. e., allowing action for benefit of next of kin, &c., for death caused by negligence,—should operate only within the territorial boundaries of the State, and the cause of action having arisen beyond the same, the action cannot be maintained. *McDonald v. Mallory*, 80.

#### DEEDS.

1. A general clause of description in a deed is sufficient. The following description held good:—"Also all other lands contained within the limits of said commons, as described on said map, &c., not heretofore conveyed by the parties of the first part, &c." *Semble*, the above does not apply to sale by sheriff and other officers. *Jackson v. Delancey* (11 *Johns.* 373; *aff'd* 13 *Id.* 551), distinguished from the case at bar. *Scully v. Sanders*, 89.
2. Possession of an instrument under seal is not conclusive evidence of delivery of instruments, so as to make them effective between the parties. Certificate of commissioner of deeds or notary public, of proof of execution and delivery by subscribing witness is not. Conjunction of possession and certificate is not. The inference of delivery arising from such possession, or certificate, or both, may be rebutted. *Diets v. Furrish*, 190.
3. Grantee's possession will not amount to such delivery where such possession was obtained through a delivery by the grantor, with the intent that the grantee should not take it as the deed of the grantor, nor receive it as grantee, but as the agent of the grantor for a special purpose. *Ib.*
4. Grantee's possession will amount to such delivery when such possession was obtained through a

delivery by the grantor, with the intent that the grantee should take it as the deed of the grantor, and receive it as grantee, although there are conditions attached to the delivery. *Ib.*

5. Grantor's possession. Although he retains the custody, yet, if the usual formalities of execution take place, and the instrument under seal is to all appearances consummated without any condition or qualification annexed, and the acts of the parties clearly evince their intention to be bound without a formal delivery, it is a complete and valid deed. *Ib.*

6. Agreement to assign municipal corporation lease constitutes agreement to grant and assign an estate in the demised land for the remainder of the term, when it contains a clause, "with all and singular the premises therein mentioned and described, and the buildings thereon, with the appurtenances, to have and to hold the same for and during all the rest, residue, and remainder yet to come of and in the term of years mentioned in said indenture of leases," with a covenant that the assigned premises are free from incumbrances. A covenant that the vendors have a good title to the premises described in the lease, for the residue of the demised term, is to be implied. A covenant that the corporation had the right and power to grant the estate and term in manner and form as in the lease expressed, is also to be implied. *Bensel v. Gray*, 872.

#### DEFENSES.

See CONVERSION; ESTOPPEL, 2; NUISANCE; PLEADING.

#### DEFINITIONS.

"License" imports leave, permission, sufferance, authorization. *Sun, &c. Ass. v. Tribune Ass.* 136.

"Fear and compulsion," as applied to execution of instrument by married woman, defined. *Fowler v. Butterly*, 148.

"On payment of costs of the action to the present time," phrase in order allowing amendment of pleading,

construed. *Havemeyer v. Havemeyer*, 170.

"Full and explicit," as applied to demand upon corporation, defined. *Mutual Life Ins. Co. v. Davies*, 172.

"Collect at our office," construction of phrase as used in sold note signed by broker. *Harrison v. Ross*, 230.

"Vacant and unoccupied" (used in insurance policy) defined, and held not to be synonymous. *Herrman v. Merch. Ins. Co.* 444.

#### DELIVERY.

1. Possession of an instrument under seal, is not conclusive evidence of delivery of instruments so as to make them effective between the parties. Certificate of commissioner of deeds or notary public of proof of execution and delivery by subscribing witness is not. Conjunction of possession and certificate is not. The inference of delivery arising from such possession, or certificate, or both, may be rebutted. *Diets v. Farish*, 190.

2. Grantee's possession will not amount to such delivery, where such possession was obtained through a delivery by the grantor, with the intent that the grantee should not take it as the deed of the grantor, nor receive it as grantee, but as the agent of the grantor for a special purpose. Grantee's possession will, when such possession was obtained through a delivery by the grantor, with the intent that the grantee should take it as the deed of the grantor, and receive it as grantee, although there are conditions attached to the delivery. *Ib.*

3. Grantor's possession. Although the grantor retains the custody, yet, if the usual formalities of execution take place, and the instrument under seal is to all appearances consummated without any condition or qualification annexed, and the acts of the parties clearly evince their intention to be bound without a formal delivery, it is a complete and valid deed. *Ib.*

See GIFT, 8, 4.



**DEMAND.**

See EXECUTORS AND ADMINISTRATORS, 5.

**DEMURRER.**

Not allowed in proceedings under c. 2, title 12, part 2, Old Code.  
See *Freeman v. Barrowcliffe*, 813.

**DESCENT.**

See ALIENS.

**DISMISSAL OF COMPLAINT.**

See ACCOUNT STATED, 2; TRIAL, 2, 8.

**DURESS.**

See HUSBAND AND WIFE, 8.

**EQUITY.**

See MARRIED WOMEN, 1; MORTGAGES; PARTNERSHIP.

**ESCROW.**

See DELIVERY, 2.

**ESTOPPEL.**

1. Where an agreement calls for the delivery by a debtor to his creditor of goods at certain prices in payment of the debt, and the goods are delivered with bills having the prices annexed, and the creditor does not return the goods, an objection that the prices contained in the bills were in excess of those stipulated for, comes too late, and the delivery of the goods must be taken as payment, to the extent of the prices contained in the bills. *Kromer v. Heim*, 237.
2. When parties to a litigation come to a settlement thereof, and one, pursuant to the settlement, and to carry it into effect, gives to the other his promissory notes (such other complying with the terms of settlement on his part), he cannot, in an action on the notes, set up that his adversary in the litigation so settled had no legal cause of action against him, without showing fraudulent concealment of material facts which were not

within his knowledge when he gave the notes. Especially is this the case where the defendant in an action on the notes himself proves the settlement and compromise. *Heeter v. Weber*, 255.

3. After a contract of purchase and sale of a lease, and of the demised premises for the unexpired term, the key of the house on the premises was delivered to the vendee, who held on to it until he had obtained the fee from the owner thereof, when he took visible possession. *Held*, that he was not estopped from setting up in an action by the vendor for the specific performance of the contract, that the lease was invalid and void. *Bensel v. Gray*, 372.

4. When one assigned to a corporation, either duly organized or held out so to be, an improvement made by him, and his right to letters-patent therefor, the consideration expressed in the assignment being \$1, but the true consideration being, by an oral agreement, a certain royalty during the existence of the patent, and afterwards, but before the issuing of the patent, the corporation, if not before duly organized, organized, or if before organized, reorganized, under the said name used in the assignment, and the assignor, without any notice of the change, procured the issue of a patent in the corporate name used in the assignment, and the company accepted the patent, entered into enjoyment thereof, and for a time paid to the assignor the royalty claimed by him, without any notice to him of any defect in its corporate existence, at a period previous thereto, the company is estopped from avoiding the obligation to pay the royalty originally agreed on. *Bommer v. Am. S. Spring Co.* 454.

See CONTRACTS, 8; COVENANTS, 2; TRADEMARKS, 1, 2

**EVIDENCE.**

1. Statements of the conductor in regard to the occurrence, not made at the time of the act so as to constitute a part of the *res gestae*, and being recitals of what the driver

- told him at the time of the event, are in the nature of hearsay evidence and inadmissible, and should have been excluded on objection. *Hendricks v. Sixth Ave. R. R. Co.* 8.
2. An opinion of a witness as to the value of services should be based either upon the statement of another witness who has testified as to his actual knowledge of the amount and character of the services, or upon a hypothetical case including some or all of the facts proven (*Mercer v. Vose*, 67 *N. Y.* 56). *Seymour v. Fellowes*, 124.
  3. Where the evidence of witnesses requires to be reconciled, because different inferences may be drawn from such evidence, an opinion of a witness as to value, based or founded solely upon the fact of hearing such evidence read, is incompetent. The question must be so stated that the witness shall have in his mind a definite state of facts (*Reynolds v. Robinson*, 64 *N. Y.* 589). The facts in the present case readily distinguishes from those in the last cited case. *Ib.*
  4. The maxim *falsus in uno falsus in omnibus* is not of universal application. *Ib.*
  5. The uncontradicted testimony of even a forsworn witness, if corroborated, must not necessarily be utterly rejected and disregarded. The true rule is that the jury is at liberty to reject utterly the testimony of a witness who has deliberately sworn falsely in regard to any material fact in the case, except in so far as he is corroborated by other credible witnesses, or by necessary inferences from undisputed facts. *Ib.*
  6. Where in an action to recover the price of a machine sold upon the contingency that it was to be tested for a certain length of time, and in that time was to perform certain work, the issue was on the performance of the contingency, and the testimony was conflicting on the question as to how and for what length of time the test was to be made, and whether it had in fact been completed according to the real terms of the sale, and in a certain view the further question presented itself whether the completion of the test agreed on had or had not been prevented or secured by the conduct of the defendant,—*Held*, that the testimony of experts, to the effect that from inherent imperfections plainly to be seen, the machine was incapable of performing the required work, had a material bearing on all the disputed points, and its exclusion was error. *Meiners v. Steinway*, 369.
  7. In case of an action upon an administrator's bond, the admission of the surety, and the fact that he acted and led others to act as if the death had occurred, is sufficient evidence, as against the surety and his executor, to establish the jurisdictional fact of death of the principal in the bond. *Mundorff v. Wangler*, 495.
  8. In an action brought to recover for services rendered from December 1, 1874, to June 22, 1878, as a general banking clerk and French correspondent, at a stipulated compensation, the answer denied all the allegations of the complaint, except the allegation that defendants were an association; the minute book of the corporation is not admissible on its own behalf, for the purpose of showing that there was no resolution of the board of directors authorizing the plaintiff's employ. *Legrand v. Man. Merc. Ass.* 562.
  9. Where judgment of Supreme Court of California on appeal is offered, it is not necessary that notice of appeal should appear in the judgment roll in order to render it admissible in evidence. The judgment record contained an order made by the supreme court reversing a decision of the court below, also an opinion given by the court on such reversal, also an order entered in the court below, reciting the filing of the remittitur from the supreme court, reversing the order and judgment therefor made by such court, and in pursuance of such remittitur ordering that judgment be entered in favor of defendant against plaintiff for \$595.66, principal and interest, all in gold coin of the United States;

also a *postea* entered in conformity with the order so entered on the remittitur, but it contained no notice of appeal. *Held*, that the record was admissible. It will be presumed that the supreme court became properly possessed of the cause on appeal. The absence from the record of a notice of appeal does not overcome this presumption. *Pac. Pn. Gas Co. v. Wheelock*, 566.

10. Statute law of California is proved by a volume having on its titlepage the following: "The statutes of California, passed at the fourteenth session of the legislature, 1863. Begun on Monday, the fifth day of January, and ended on Monday, the twenty-seventh day of April. Sacramento: Benjamin P. Avery, State Printer. 1863," and the testimony of a practitioner at the bar of that State, who stated that that edition was recognized by the bar and courts of that State, and was in fact the only one they had to use, but was unable to state whether he had himself used or had seen others use a volume of that edition in the courts. *Ib.*

11. A copy of report of a railway company to State engineer and surveyor, in accordance with 2 *R. S.* (6 ed.) p. 534, section 45, subd. 102; and *Ib.* p. 552, section 99, duly certified by the deputy State Engineer, under 1 *R. S.* (6 ed.) p. 558, section 7; *Ib.* p. 415, section 7; and *Code Civil Pro.*, section 983, is competent evidence of a material admission made by the defendant as a corporation, with respect to the injury complained of. *Leonard v. N. Y. C., &c. R. R. Co.*, 575.

When admission of incompetent evidence not cured by judge's charge. See *Branch v. Levy*, 507.

SEE APPEAL, 4; COMMISSION TO TAKE TESTIMONY; DAMAGES, 7; DELIVERY, 1; PARTNERSHIP, 3; RAILROADS, 1; SALE, 1; WITNESS.

#### EXAMINATION BEFORE TRIAL.

1. Although it is obligatory to grant

an order for examination upon presentation of an affidavit complying in form with the requirements of section 872, yet the order, when granted, may be vacated for cause shown. *Levy v. Loeb*, 291.

2. If the affidavit on which the order was obtained is defective in any necessary particular, or if the allegations contained therein, though sufficient by themselves, are successfully met by opposing proof, cause for a vacatur is shown. *Ib.*

3. The rules laid down in *Winston v. English*, 44 *How. Pr.* 398, may still be followed with safety. *Ib.*

4. In case of an examination of party to action before trial in an action for libel, defendant cannot be compelled to prove against himself the publication of the alleged libel, or to disclose any matter constituting a link in the chain of evidence, which may fasten the publication on him. Therefore, unless plaintiff shows that there are other matters as to which it is necessary and material to have the testimony of defendant before trial, the order for his examination will be vacated. *A fortiori* where plaintiff's papers show that the sole object of the examination is to prove by defendant that he published or caused to be published the libel, and do not show either that the examination is necessary for the framing of the complaint, or that the publication cannot be proved by other testimony. *Corbett v. De Comeau*, 806.

5. A general affidavit "that the testimony of the defendant is material and necessary to plaintiff in the prosecution of this action," does not satisfy rule 89. *Ib.*

6. In this case the objections of the plaintiff (a non-resident) to his examination before trial were sustained on the ground that the affidavit upon which the order was granted omitted to state plaintiff's residence, or that inquiry had been made to ascertain it, or that there was difficulty in learning it. It also omitted to state whether plaintiff had appeared by attorney, no name, resi-

dence, or office-address of any attorney on plaintiff's behalf appearing in defendant's affidavit. Also, upon the ground that there was no proof of any notice to plaintiff of the order, or that any order, affidavit, or subpoena in relation thereto was served upon him. The affidavit and order were served upon plaintiff's attorney. *Dunham v. Merc. M. Ins. Co.* 387.

See PRACTICE, 4.

### EXCEPTIONS AND OBJECTIONS.

A general exception to the refusal of the court to charge as requested is untenable unless each and all of the several propositions submitted are sound in law, and applicable to the facts and circumstances of the case. If either of the propositions be erroneous, the objection is unavailing (See cases cited in opinion of the court). *Sun, &c. Ass. v. Tribune Ass.* 136.

See APPEAL, 2, 6, 7; TRIAL, 1, 2, 4.

### EXECUTORS AND ADMINISTRATORS.

1. Contracts of executors and administrators, although made in the interest, and for the benefit of the estate they represent, if made upon a new and independent consideration, moving between their promisee and themselves, are their personal contracts, and do not bind the estate (*Austin v. Munro*, 47 *N. Y.* 360; *Ferrin v. Myrick*, 41 *Id.* 315; *Cary v. Gregory*, 38 *N. Y. Super. Ct.* 127; and *Ross v. Harden*, 42 *Id.* 427). *Ross v. Harden*, 26.
2. If, however, a valid contract was in fact made by the plaintiff with the deceased, the action can be maintained in its present form, and it can be averred in one count or statement of the cause of action (as in the complaint in this action) that both the intestate and his representatives promised to pay (*Benjamin v. Taylor*, 12 *Barb.* 328; *Ross v. Harden*, cited above). *Id.*
3. No contract can bind the legal representatives of a deceased per-

son, that was not valid and binding upon that person at the time it was made. So, if a contract be invalid and void, as being against good morals, or in conflict with the established policy of law, neither the parties to it nor their respective executors or administrators acquire any rights, or incur any liabilities under or by virtue of the same. *Id.*

4. This action was brought against executor of surety for a breach of administrator's bond, by the omission of the administrator to obey a decree for payment. The said decree directing the payment and stating facts sufficient to show that the surrogate was proceeding within his jurisdiction, the petition for the decree, and the citation issued thereon, and the bond, having been read in evidence, and it having been proved that the administrator had omitted to perform the decree, that the surrogate's certificate under the decree had been duly docketed, that execution had been duly issued and returned unsatisfied, and that the surrogate had assigned the bond, *Held*, that plaintiff had made out a case which required the direction of a verdict in his favor. Proof of proceedings anterior to petition (other than the bond) is in such case unnecessary. *Mundorff v. Wangler*, 495.
5. Demand for payment of decree held not necessary in above case. *Id.*
6. In case of administrator's bond, approval by surrogate is not necessary, to render it obligatory on the surety. It is required for the benefit of creditors and distributees, who may waive it. *Id.*

What is sufficient evidence of jurisdictional fact of death, as against one sued as surety on an administrator's bond. See *Mundorff v. Wangler*, 495.

### FICTITIOUS NAMES.

See PRACTICE, 8.

### FIRE COMMISSIONERS.

See *N. Y. City*, 4, 5.

## FOREIGN LAW.

How proven. See *Pac. Pn. Gas Co. v. Wheelock*, 566.

## FRAUD.

1. When a party pleads that he has been defrauded, he is bound to so aver it, that his opponent shall have notice of it, and an opportunity to meet it. It is not to be gathered from vague and partial allegations and obscure inferences (see cases cited in the opinion of the court). *Hilsen v. Libby*, 12.
2. False statements made by a party in regard to the solvency and pecuniary resources of his firm, for the purpose of obtaining credit on the purchase of goods for said firm, and with the intent to cheat and defraud the party from whom the goods are purchased, when sufficiently averred in a pleading or affidavit, are sufficient to sustain an action on the case for fraud and deceit against the party making such false statements (*Stitt v. Little*, 63 *N. Y.* 427), and uncontroverted they show the debt to have been fraudulently contracted, and for the fraud thus perpetrated the partner by whom the false representations are made, if not others who profited by the transaction, can be lawfully arrested and held to bail (*Sherman v. Smith*, and cases therein cited, 42 *How. Pr.* 198). *Witmark v. Herman*, 144.
3. A statement that a certain business would yield large profits, is not a false representation. *Sparrmann v. Keim*, 163.

See CONVEYANCES TO HINDER, &C. CREDITORS; ESTOPPEL, 2; PLEADINGS, 2; TRADEMARKS, 1, 4; TRUSTS, 1-3.

## GENERAL TERM.

See TRIAL, 1.

## GIFT.

1. Before the statute relating to and protecting the estates of married women, the husband had power to give, directly and without the intervention of trustees, personal property to his wife, so that the same

became free in equity from his power of disposition of the same. By our present statute law a gift of property by a husband to his wife vests the same absolutely in the wife, and it becomes her separate property and estate to all intents and purposes. *Fowler v. Buttery*, 148.

2. The form of the gift is not important if it appears that there was an executed intention to give (*Stewart v. Kissam*, 2 *Barb.* 493). *Ib.*
3. In all cases it is safest to consider that there must be a delivery of the gift, or an execution of the intention on the part of the donor, to benefit the donee without delivery. In this case the omission to deliver the policy to the wife is not conclusive against the gift, because the form of the gift was such that the husband would naturally retain the policy in his possession, to use for himself (in case he lived until the year 1881). *Ib.*
4. In cases of choses in action actual delivery is not always necessary (see the cases cited and reviewed in the opinion of the court, as applicable to the questions in this case). The original delivery of this policy was to the husband in behalf of his wife as well as in his own behalf, and upon that delivery the wife became vested with an interest in the policy which the husband could not take nor divest from her without her consent. *Ib.*

## HUSBAND AND WIFE.

1. Transfers of personal property made by husband direct to wife, without intervention of an intermediate party, are valid, as between themselves. *Seymour v. Fellows*, 124.
2. Choses in action may pass by delivery from one to the other, even without a written assignment (*Lockwood v. Cullin*, 4 *Robt.* 129; *Mack v. Mack*, 3 *Hun.* 323). *Ib.*
3. If the means used by the husband deprived the defendant of mental or moral power to guide her actions for herself, the signature was not voluntary, but extorted from



her. If she was induced or persuaded to act, her signature was voluntary. If she was compelled to act, it was involuntary. The kind and amount of force used in such a case has the same relations that it would have in a charge of robbery, as distinguished from larceny or false pretenses. What will compel a wife to sign may depend upon her temperament, and the past relations between her and her husband. There may be little in the way of threats or action, and yet the absolute fact may be, that resistance to his will or non-compliance with it may be impossible. If the wife testifies to her own state of mind, and swears that she was afraid of her husband, the court must rest upon that fact, if she is a credible witness. *Fowler v. Butterly*, 148.

4. Before the statute relating to and protecting the estates of married women, the husband had power to give, directly and without the intervention of trustees, personal property to his wife, so that the same became free in equity from his power of disposition of the same. By our present statute law a gift of property by a husband to his wife vests the same absolutely in the wife, and it becomes her separate property and estate to all intents and purposes. The form of the gift is not important if it appears that there was an executed intention to give (*Stewart v. Kismam*, 2 Barb. 498). *Id.*

See GIFT, 3, 4; INSURANCE, 1, 2.

#### INJUNCTION.

1. The preliminary injunction was obtained on the ground that an assignment made by Volkening was fraudulent as against certain creditors represented by the receiver. The fraudulent character of the assignment was sworn to on information and belief, no facts were stated from which the conclusion could be drawn, and the sources of information were not given; and for all that appeared the judgment under which the receiver was appointed might have been recovered on cause of action

which arose subsequent to the assignment, not on contract. In addition to this there were two affidavits read on behalf of the defendants as to the *bona fides* of the assignment. *Held*, that a *prima facie* case for an injunction had not been presented. *Perry v. Volkening*, 332.

2. Restoration of things to their former condition may be effected by a mandatory injunction. *Du Bois v. Darling*, 436.
3. Where, under the laws of this State, it is clear that the title to the land in question descended to and vested in the plaintiff, and the only claim of defendants (who are aliens) is under a treaty between the United States and a foreign country, and it is not clear what rights they have under such treaty, and there is danger that the rents and profits of such land may be removed beyond the jurisdiction of the court and of the State, pending an action for ejectment a proper case for an injunction is made. *Renner v. Muller*, 535.

See TRADEMARKS, 4.

#### INSURANCE.

1. Nicholas Butterly, the husband of the defendant, procured a policy of life insurance to be issued to him in September, 1869, by the North America Life Insurance Co., which assured his life in the sum of \$5,000, until September 6, 1882, or until his decease, in case he died before the last named date, and then said company agreed to pay the said \$5,000 to him, in case he was living at the expiration of the time, and in case of his decease before that time, it agreed to pay the said sum to his wife, the defendant. In October, 1872, both husband and wife executed an assignment of the policy to one McCormack, who subsequently assigned the same to plaintiff. In 1875, Nicholas Butterly died. The plaintiff sued the company, who paid the money into court, and procured the substitution of the defendant in its place. *Held*, that the policy of insurance was not protected by

- the statute in respect of life insurance for the benefit of married women; and that the wife had the power to transfer any right or interest in the policy, that had vested in her at the time she executed the purported assignment.  *Fowler v. Butterly*, 148.
2. In this case the husband was not possessed of the whole legal and beneficial property and interest in the policy. The wife had a right and interest therein created by her husband in the nature of a gift, and it thereby became her sole and separate estate, and he had not the power in law or equity to dispose of it. And the assignment by the wife, &c., would be good, but for the compulsion under which she executed the same. *Ib.*
  3. In this case the omission to deliver the policy to the wife is not conclusive against the gift, because the form of the gift was such that the husband would naturally retain the policy in his possession, to use for himself (in case he lived until the year 1881). The original delivery of this policy was to the husband in behalf of his wife as well as in his own behalf, and upon that delivery the wife became vested with an interest in the policy which the husband could not take nor divest from her without her consent. *Ib.*
  4. The loss under a policy was not payable until sixty days after due notice and proof of the same should have been made by the assured and received at the office of the company in accordance with the terms and provisions of the policy. By the terms and provisions of the policy, persons sustaining loss or damage were required to "forthwith give notice of said loss to the secretary of the company, and within thirty days after said loss" to "render to the secretary a particular account of such loss," containing certain specified matters. *Held*, that the giving of such notice and the rendering of such account were conditions precedent. The prescribed time within which the account is to be rendered is of the essence of the contract. A strict compliance is necessary. Nine days after the time is too late. *McDermott v. Lye. Ins. Co.* 221.
  5. Proofs were rendered nine days too late; the agent of the company on whom they were served (according to the evidence most favorable to the plaintiff) said "they would not accept these as proofs of loss." Four days after this, the plaintiff's attorneys were notified that the proofs were too late. The company retained the proofs and did not return or offer to return them. *Held*, no waiver of non-compliance as to time. *Ib.*
  6. Vacancy and absence of occupancy, as two separate facts, must occur jointly, to constitute breach of condition of policy, that it shall be void if the premises become vacant and unoccupied. *Herrman v. Merch. Ins. Co.* 444.
  7. Definition of "vacancy" is, empty—void of every substance except air. Ergo—a dwelling-house in charge of servants, with all its furniture, cooking-utensils, beds, mattresses and summer clothing of the owner and his family, is not vacant, although neither the owner nor any member of his family is in personal occupation. Premises are unoccupied when no one has the actual use or possession. "Vacant" and "unoccupied" are not synonyms. *Ib.*
- See PRINCIPAL AND SURETY, 1.
- INTENT.
- See JURISDICTION OF STATE.
- IOWA LAW.
- See CORPORATIONS, 2.
- JOINT DEBTORS.
- See PRACTICE, 8, 9.
- JUDGE'S CHARGE.
1. A general exception to the refusal of the court to charge as requested is untenable unless each and all of the several propositions submitted are sound in law, and applicable to the facts and circumstances of the case. If either of

the propositions be erroneous, the objection is unavailing (see cases cited in opinion of the court). *Sun Ass. v. Tribune Ass.*, 136.

2. An error in reception for the purpose of proving agency of letters written after the close of the transaction in question by one claimed to be an agent, will not, in a case where the evidence as to the fact of agency is nearly balanced, be cured by a charge that such terms were not evidence for the reason that if the writer had in fact been an agent, his power to bind the defendants by his declaration ceased upon his making the agreement. This, although such letters were properly used on the cross-examination of the alleged agent, to affect his credibility or contradict him. *Brunch v. Levy*, 507.

See DAMAGES, 7.

## JUDGMENTS AND DECREES.

A surrogate's decree for payment is not rendered void or inoperative by error in the amount directed to be paid, nor will such error preclude recovery of correct amount. *Mundorff v. Wangler*, 495.

When and how judgment appointing receiver and dissolving partnership, may be amended after appellate court has become possessed of the cause upon appeal. See *McKelvey v. Lewis*, 561.

See ACCORD AND SATISFACTION, 1; EVIDENCE, 9; JURISDICTION; PRACTICE, 8, 9; RES ADJUDICATA, 1.

## JURISDICTION.

1. Want of jurisdiction renders void the judgment of any court, whether the same is a court of superior or inferior, of general or limited jurisdiction. The recital of jurisdictional facts in the record of a judgment of any court is not conclusive, but only *prima facie* evidence of the facts recited; and a party, against whom a judgment is offered, is not estopped or prevented by the fact of such recitals appearing, from establishing by evidence that those recitals were

untrue. *Chapman v. Phenix Nat. Bk.*, 340.

2. Where a statute prescribes that some fact must exist before jurisdiction of the court can attach, then such fact must appear, or there can be no jurisdiction, and the court cannot acquire it by erroneously deciding that the fact exists, and that it has jurisdiction. *Ib.*

3. But where general jurisdiction is given to a court over any subject, and that jurisdiction depends upon facts brought before the court and submitted as evidence for its consideration and determination, and the court is required to act upon such evidence, then its decision, upon the question of its own jurisdiction, based upon such evidence, is conclusive until reviewed or vacated, so far, at least, as to protect its officers and all other persons who act upon the same in good faith (*Roderigas v. East River Savings Institution*, 63 N. Y. 460, and cases there cited). *Ib.*

See RES ADJUDICATA, 1; U. S. LAW.

## JURISDICTION OF STATE.

- A State has a right of jurisdiction, through its law, over a vessel belonging to it, that is on the high seas (*Crapo v. Kelly*, 16 Wall. 610, and authorities there cited; and also *Thuhler v. Trans. Co.*, 35 N. Y. 352). But where the exercise of the right of jurisdiction is committed by the State to its legislators or officials, that exercise is limited, 1st, by the powers given to them by the State, 2d, by their intent as expressed or manifested by statute or action; that is, in the present case, whether or not the statute extends to vessels on the high seas, depends upon the intent of the legislature in that respect in enacting the statute. *McDonald v. Mallory*, 80.

## JURY.

See TRIAL, 5.

## LANDLORD AND TENANT.

An agreement to reduce the rent re-



served by a lease for the balance of the demised term thereafter to ensue requires a new consideration. *McMaster v. Kohner*, 253.

## LAW OF NATIONS.

See U. S. LAW, 1, 2.

## LEASE.

1. An agreement to assign municipal corporation lease constitutes agreement to grant and assign an estate in the demised land for the remainder of the term. When it contains a clause "with all and singular the premises therein mentioned and described, and the buildings thereon, with the appurtenances, to have and to hold the same for and during all the rest, residue, and remainder yet to come of and in the term of years mentioned in said indenture of leases," with a covenant that the assigned premises are free from incumbrances, a covenant that the vendors have a good title to the premises described in the lease, for the residue of the demised term, is to be implied. A covenant that the corporation had the right and power to grant the estate and term in manner and form as in the lease expressed, is also to be implied. *Bensel v. Gray*, 372.
2. The burden of proof is on the vendors, to show the regularity and validity of the lease in above case. *Id.*

See EETOPPEL, 3; LANDLORD AND TENANT; PARTNERSHIP, 3-5.

## LIBEL.

See EXAMINATION BEFORE TRIAL, 4.

## LICENSE.

The word "license" imports leave, permission, sufferance, authorization. It implies only the removal of legal restraint by a grant of permission. The necessary license is granted when it expressly authorizes "such acts to be done as may be necessary to enable the person to whom it may be given, to perform the duty which the

statute in such a contingency creates" (*Sherwood v. Seaman*, 2 *Bow.* 127). Foregoing applied to license to enter upon premises for the purpose of shoring up and supporting by proper foundations a wall, in order to enable a party to excavate adjoining premises, pursuant to chapter vi. of the laws of 1855. *Sun, &c. Ass. v. Tribune Ass.*, 136.

See NUISANCE.

## LIMITATIONS OF ACTIONS.

In an action by an assignor for an accounting, as to articles manufactured under a patent, assigned by an instrument under seal, in consideration of a certain royalty on each article so manufactured, and for payment of the amount of royalty found due, the accounting is not to be limited to a period of six years before the commencement of the action. *Bommer v. Am. S. S. Co.*, 454.

See CORPORATIONS, 4, 5.

## MARRIED WOMEN.

1. *Held*, by Judge SANFORD, that plaintiff cannot enforce this contract, because she has no interest in the matter, for as a married woman she executed the bond and mortgage, and under *Cashman v. Henry*, she incurred no personal liability thereby, and did not charge in equity her separate estate other than the mortgaged premises, and, having conveyed away all interest in the mortgaged premises, she has no interest entitled to protection from the defendant. *Slawson v. Watkins*, 73.
2. "Under the statutes as they now exist, a married woman, as incident to her right to acquire real and personal property by purchase, and hold it to her sole and separate use, may purchase property upon credit and bind herself by an executory contract to pay the consideration money, and her contract may be enforced against her in the same manner and to the same extent as if she were a feme sole, and her liability in such case does not depend upon the proof

or existence of special circumstances, but is governed by the ordinary rules which determine the liability of persons *sui juris* upon their contracts." Above doctrine laid down by court of appeals in this case, overruling principles maintained by superior court, general term, herein. *Cashman v. Henry*, 93.

Alien married women capable of inheriting, when. See *Renner v. Muller*, 535.

See GIFT, 1; INSURANCE, 1, 2, 3.

### MASSACHUSETTS LAW.

By the usage of railroad companies no freight was delivered between 5½ p. m., on Saturday night until the next Monday morning. All freight remaining undelivered at 5½ p. m. Saturday was stored in the company's freight warehouse, ready for delivery when called for on the following Monday. *Held*, under the law of Massachusetts, that although the train containing the goods had arrived on Saturday at 3½ p. m., and the consignee was in attendance to receive them, yet as it did not arrive in time for the delivery of the goods to the consignee before 5½ p. m. of that day, the company's liability as common carrier ceased upon a discharge of the goods from the cars to the company's freight warehouse. *Haulkner v. Hart*, 471.

### MASTER AND SERVANT.

1. If the master, when sued for an injury resulting from the tortious act of his servant while apparently engaged in executing his orders, claims exemption on the ground that the servant was in fact pursuing his own purposes, without reference to his master's business, and was acting maliciously and willfully, it must, ordinarily, be left to the jury to determine the issue. Where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury (*Rownes*

*v. Del., Lack. & Western R. R. Co.*, 84 N. Y. 129). *Hoffman v. N. Y. C. & R. R. Co.*, 1.

2. The master is answerable in damages for the mere negligence of his servant, only to the extent of compensation for the injury received. The court should have charged the jury, on the request of the defendant, that this case was not one in which punitive or exemplary damages might be awarded. *Hendricks v. Sixth Ave. R. R. Co.*, 8.

As to what constitutes hiring by corporation. See *Legrand v. Man. & C. Ass.*, 562.

See RAILROADS, 1-4.

### MAXIMS.

*Falsus in uno falsus in omnibus.* *Seymour v. Hellows*, 124.

*Actio personalis moritur cum persona.* *Ross v. Harden*, 26.

*Testes ponderantur, non numerantur.* *Seymour v. Hellows*, 124.

*Expressio eorum quæ tacite in sunt nihil operatur.* *Knoler v. Butterly*, 148.

*Respondeat superior.* *Haulkner v. Hart*, 471.

### MORTGAGES.

- 1 In this case the plaintiff, a married woman, owned certain real estate subject to a purchase-money mortgage for \$22,000, executed by her. She entered into a contract with defendant to sell and convey the said real estate, and defendant covenanted and agreed to pay this mortgage as a part of the purchase-money. Plaintiff executed the contract on her part by conveying the property to a third person, as requested by defendant, subject to the lien of the mortgage, but without any covenant of the grantee to pay said mortgage. The mortgage not being paid according to its terms, the mortgagee commences an action to foreclose the same, making plaintiff a party defendant, to answer for any deficiency on the sale. The plaintiff commences this action against defendant for the specific performance of his contract to

- pay said mortgage. *Held*, that said contract cannot be enforced specifically until it is established with definiteness and certainty: 1st. That there will be a deficiency on the sale of said real estate. 2d. The amount of that deficiency. *Stauson v. Watkins*, 73.
2. *Held*, also, by Judge SANFORD, that plaintiff cannot enforce this contract, because she has no interest in the matter, for as a married woman she executed the bond and mortgage, and, under *Cashman v. Henry*, she incurred no personal liability thereby, and did not charge, in equity her separate estate other than the mortgaged premises, and, having conveyed away all interest in the mortgaged premises, she has no interest entitled to protection from the defendant. *Ib.*
  3. Where a grantor of an equity of redemption in mortgaged premises is not personally liable to pay the mortgage debt, and has no legal or equitable interest in such payment, except so far as the mortgage may be a charge upon the lands mortgaged, his grantee thereof incurs no liability to the holder of the mortgage by reason of a covenant on his part, contained in the deed, to assume and pay the mortgage (*King v. Whitely*, 10 *Pais*, 465; *Vrooman v. Turner*, 69 *N. Y.* 280). *Cashman v. Henry*, 93.
  4. No person can invoke the aid of a court of equity for a redemption of a mortgage, except he who is entitled to the legal estate of the mortgagor or who claims a subsisting interest under him (*Grant v. Duane*, 9 *Johns.* 591). *Chamberlain v. Ib.*, 116.
  5. When mortgage is assumed by grantee of mortgagor, as to the mortgagor, the land becomes the primary fund for the payment of the mortgage debt, and the mortgagor stands thereafter in the attitude of surety only. As to the mortgagee, after notice of assumption by the grantee, he is bound in his dealings with the grantee and others, in regard to the mortgage debt, to do nothing to the injury of the mortgagor as surety. The mortgagor has a right to demand that the mortgagee proceed without delay, after his right of action has accrued, to collect the mortgage debt out of the land and grantee, and if he neglects so to do after full and explicit request, and collection therefrom becomes thereby either wholly impossible or only partially impaired, then the mortgagor is either wholly, or *pro tanto*, as the case may be, discharged. If the mortgagee extends the time of payment to the grantee, the mortgagor will be discharged. Conveyance by such grantee of the mortgage to a subsequent grantee who also assumes the mortgage, does not impair the above stated rights of the mortgagor. It gives him the additional advantage of the subsequent assumption. *Mut. Life Ins. Co. v. Davies*, 172.
  6. The mere abandonment of foreclosure proceedings upon payment, by a subsequent incumbrancer, of the costs and interest then due, and the receipt from such incumbrancer of interest subsequently falling due, there being no agreement to extend the day of payment of the mortgage, will not discharge one who stands in the position of surety for the mortgage debt, although he be the mortgagor. *Ib.*
- See MARRIED WOMEN, 2.
- MOTIONS AND ORDERS.**
- See APPEAL, 1, 6; COSTS AND ALLOWANCES, 1; EXAMINATION BEFORE TRIAL; TRIAL, 1-4.
- MUNICIPAL CORPORATIONS.**
- See N. Y. CITY.
- NEGLIGENCE.**
- See MASTER AND SERVANT, 2; NUISANCE; RAILROADS, 4.
- NEW TRIAL.**
- Conviction for perjury is necessary before a motion for a new trial will be granted on the ground of perjury of a witness of successful party. Voluntary confession of

his perjury, and an affidavit of the witness to that effect, does not make an exception to this rule, especially where one of the unsuccessful parties made admissions on the trial to about the same effect as the testimony of the witness sought to be falsified. *Holtz v. Schmidt*, 327.

See APPEAL, 6 ; TRIAL, 4.

#### NEW YORK CITY.

1. The board of education of the city of New York is a governmental agency created by the sovereign power of the State, for the discharge of such powers and duties as were conferred upon it by law, and in addition to its being or existence as such agency, it is also a corporation. *Donovan v. Board of Education*, 53.
2. The statutes expressly provide that for the purposes for which it was created, the board should possess the powers and privileges of a corporation (*Laws of 1851*, chap. 886, § 2, subd. 1, § 8). They must, therefore, be subject to the obligations incident to the exercise of such powers (*Gildersleeve v. Board of Education, &c.*, 17 *Abb. Pr.* 201 ; *Ham v. Mayor, &c.*, 37 *N. Y. Super. Ct. [J. & S.]* 458 ; *Dannat v. Mayor, &c.*, 6 *Hun*, 88). *Ib.*
3. *Held*, that under the pleadings in this case, the duty, for the neglect of which this action was brought, must be deemed to have been imposed upon the board in its corporate capacity, and it is liable for its neglect of such duty. The case of *Clarrissey v. Metropolitan Fire Department*, 1 *Sweeney*, 224, held to be analogous to this case. *Ib.*
4. Corporation of the city of New York is not liable for officers' salary, where there has been no performance of the duties of the office. *Wood v. Mayor, &c.*, 321.
5. While section 85, ch. 137, *Laws 1870*, was in force, a fireman was tried on, and found guilty of, a certain charge preferred against him, and the board of fire commissioners sentenced him to be "retired from active service on

an annuity of \$150, to date from 12th inst." *Held*, 1. Though the board may not have power to grant the annuity, yet its action in retiring the fireman was valid and operative. 2. The sentence of retirement was in substance and effect one of discharge and dismissal from the service. 3. That the fireman not having performed any service after such discharge, was not entitled to the salary attached to the position of fireman thereafter accruing. *Ib.*

6. The sales for the taxes of the years 1841, 1842, 1848, and the leases given thereon, and the sale for the years 1853 and 1854, and the leases given thereon, are invalid and void. *Bensel v. Gray*, 372.

#### NOTARIES AND COMMISSIONERS.

See DEEDS, 2.

#### NOTICE.

In this case plaintiff intrusted to her husband a bond belonging to her, to be deposited in the German Savings Bank for safe keeping, which he thereupon took to said bank with plaintiff's bank book, and delivered to the cashier, who placed the bond in the bank safe, and wrote the following memorandum and attached it to said bank book, and returned the same to defendant's husband: "Mrs. Anna Zugner, Morrisania Steamboat Co., No. 1, Bond \$1,000, August 20, 1873." *Held*, that the said transaction was had with the cashier as an officer of the bank in the line of his duty, and that the bank recognized, and was charged with notice of plaintiff's title to the bond. There was other evidence in the case of notice to the bank's trustees of plaintiff's title. *Held*, that a subsequent transfer of the bond to the bank by plaintiff's husband was void. *Zugner v. Best*, 393.

See EXAMINATION BEFORE TRIAL, 6.

#### NOTICE OF APPEAL.

See APPEAL, 6.

### NUISANCE.

A coal-hole in the side-walk, maintained without license from the proper city authorities, is a nuisance, and the party upon whose premises it is, irrespective of his negligence, becomes responsible to any one passing upon the side-walk who is, without fault on his part, injured by it. Defendant cannot prove the usual license as a defense to such an action, unless the same was pleaded in his answer. *Clifford v. Dam*, 391.

### OFFICERS.

1. Exercise of excess of power does not invalidate that which falls within the power where that which is authorized neither depends on nor is a mere incident to, nor flows out of that which is in excess. *Wood v. Mayor, &c.*, 321.
2. Corporation of the city of New York not liable for officers' salary, where there has been no performance of the duties of the office. *Ib.*

See NOTICE.

### PARTIES.

In the absence of *mala fides* in a plaintiff's possession of promissory notes, indorsed in blank or specially to himself or his own order, the legal title is in him, and he is legally the real party in interest, and can maintain an action on the same, even though it appears that the transfer is merely colorable as between the parties (See cases cited in *Hays v. Southgate*, 10 *Hun*, 511; also *Sheridan v. The City of New York*, Court of Appeals, see 4 *N. Y. Weekly Dig.* 28). *Freeman v. Falconer*, 182.

### PARTNERSHIP.

1. The estate of a *cestui que trust* is liable and can be held for the fraud of a trustee, by a purchaser of the trust property itself for a full and fair price without notice or knowledge of the trust. The contribution of trust property to the capital stock of a copartner-

ship at the time of its formation, by a trustee, as his own property, and so contributed without notice or knowledge to the other copartners of the fact of its being trust property, is closely analogous to its sale and purchase. There is but little, if any, difference in principle. In such case the *cestui que trust*, seeking his property (thus converted) from copartnership assets, can only claim and take therefrom what his trustee would be entitled to take had he been vested with absolute ownership of the funds invested by him in the copartnership, instead of holding the same as he did, merely in trust. *Hollembuck v. More*, 107.

2. The equities of the copartners of a trustee, dealing with him as the absolute owner of the property contributed by him to the copartnership, and without notice or knowledge of any trust relations in regard to the same, are paramount to those of the *cestui que trust*, in regard to such property. *Ib.*
3. If a partner take a lease of lands in his own name for the purposes of the partnership, he will be considered in equity a trustee of such lease for himself and his copartners (*Collyer on Part.*, § 160, and cases there cited). But in *Otis v. Sill* (8 *Barb.* 102), where a lease was taken by one member of a firm in his own name, there being no evidence that it was taken for the firm and with express reference to its business, beyond the facts that the partnership commenced at the date of the lease and was carried on upon the demised premises, it was held that the lease did not belong to the firm, and it was also held, that parol evidence was inadmissible to show that the lease was executed for the benefit of the firm, for the reason that by such evidence it was sought to create a trust in real estate by parol, which was prohibited by statute (2 *R. S.* 135, § 6). *Chamberlain v. Chamberlain*, 116.
4. There is no presumption that a leasehold, standing in the name of one of several copartners, and

used by the firm for their business, constitutes partnership assets. The presumption is otherwise. Its mere use for partnership purposes does not operate to divest or affect the legal title. *Ib.*

5. If, however, it be made to appear that real estate and chattels real standing in the name of one of a firm, does in fact belong to the partnership, equity will treat it as such, and will decree the person holding it to be a trustee for those beneficially interested, but it must appear that such real estate has been so treated, and was purchased and held for partnership purposes and account, or in some form voluntarily subjected by the legal owner to the equitable rights and liens of all the partners and partnership creditors. *Ib.*

6. Where the relations of a partner to his copartners have been terminated, yet his name was continued in the name and style of the firm formed by his former copartners with his knowledge, sanction and approval,—*Held*, that he was liable on the contracts and obligations of the firm so using his name as if he had actually continued as a member and partner thereof. *Freeman v. Falconer*, 182.

When members of body purporting to be a corporation, held liable as partners. See *Jessup v. Carnegie*, 260.

See ARREST ; RECEIVERS ; RES ADJUDICATA, 2.

#### PATENTS.

See LIMITATION OF ACTIONS ; TRADEMARKS, 1.

#### PAYMENT.

A transfer of property is presumed to be given in payment only when made at the time of the creation of the indebtedness, and is presumed not to be given in payment, when the transfer is made after the creation of the indebtedness. *Sweeney v. Prior*, 837.

See BROKERS, 1 ; ESTOPPEL, 1.

#### PERJURY.

See NEW TRIAL.

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#### PLEADING.

1. When a party pleads that he has been defrauded, he is bound to so aver it that his opponent shall have notice of it, and an opportunity to meet it. It is not to be gathered from vague and partial allegations and obscure inferences (See cases cited in the opinion of the court). *Hilsen v. Libby*, 12.

2. In an action upon a check against maker by a holder after dishonor, defense of fraudulent representation by the payer to the maker must be pleaded. *Raubitschek v. Blank*, 564.

See EXECUTORS AND ADMINISTRATORS, 2 ; NUISANCE ; PRACTICE, 9 ; TRIAL, 1.

#### PLEDGE.

See BROKERS, 2.

#### POLITICAL JURISDICTION.

See JURISDICTION OF STATE.

#### POSSESSION.

See BILLS, NOTES AND CHECKS, 2.

#### PRACTICE.

1. Although it is obligatory to grant an order for examination before trial, upon presentation of an affidavit complying in form with the requirements of section 872, yet the order, when granted, may be vacated for cause shown. *Levy v. Loeb*, 291.

2. If the affidavit on which the order for examination before trial was obtained is defective in any necessary particular, or if the allegations contained therein, though sufficient by themselves, are successfully met by opposing proof, cause for a *vacatur* is shown. *Ib.*

3. The rules laid down in *Winston v. English* (44 *How. Pr.* 898), may still be followed with safety. *Ib.*

4. After service of a complaint setting forth a good cause of action with sufficient certainty, but before answer, plaintiffs, upon an affidavit setting forth various facts which might, perhaps, have been sufficient to call for an examination in case a general denial had been interposed, but not claiming



that plaintiffs desired to amend their complaint, and that the examination was material and necessary for that purpose, the claim being, simply, that it was material and necessary for the prosecution of the action, obtained an order for the examination of two of the defendants. Those defendants moved to vacate the order upon the papers on which it had been obtained, and on an affidavit showing that, prior to the commencement of this action, the defendants had brought an action against the present plaintiffs, that in that action the present plaintiffs had set up by answer the cause of action now sued upon, had procured an order for the examination of the defendants, had actually examined one of them at considerable length, on presumably the same issues as will arise in the present case, and that said examination had been finished and closed, *Held*, sufficient cause for a *vacatur* had been shown. A claim that if defendants should fail to answer, the examination of some of them would be necessary to enable the plaintiff to obtain judgment on application to the court, held, under the circumstances, to be of too speculative a character to uphold the order. *Id.*

5. Present system of practice is constituted of—1. The code of civil procedure. 2. Unrepealed portions of the old code. 3. Statutes not embraced in either. 4. Rules and practice of the courts preserved by section 460 of the old code, so far as they are not inconsistent with later legislative enactments. If any particular section, or part of the system, be intricate, obscure or doubtful, its meaning is to be ascertained by comparing it with the other sections or parts in the light of the general legislative intent disclosed by the whole system with respect to the section or part questioned. *Id.*

6. In case of an examination of party to action before trial in an action for libel, defendant cannot be compelled to prove against himself the publication of the alleged libel, or to disclose any mat-

ter constituting a link in the chain of evidence, which may fasten the publication on him. Therefore, unless plaintiff shows that there are other matters as to which it is necessary and material to have the testimony of defendant before trial, the order for his examination will be vacated. *A fortiori* where plaintiff's papers show that the sole object of the examination is to prove, by defendant, that he published or caused to be published, the libel, and do not show either that the examination is necessary for the framing of the complaint, or that the publication cannot be proved by other testimony. *Corbett v. De Comeau*, 806.

7. A general affidavit "that the testimony of the defendant is material and necessary to plaintiff in the prosecution of his action," does not satisfy rule 89. *Id.*
8. An action was brought against two persons alleged to be joint debtors. One was sued by a fictitious name. He did not appear. The other appeared and defended. The judgment record showed a full and absolute judgment, entered upon a personal service of the summons and complaint on the person designated by the fictitious name, and upon verdict as to the other,—*Held*, that chapter 2, title 12, part 2, of old code (proceeding by summons to show cause why a defendant not served, the others being served, should not be bound by the judgment entered in form against him with the others), did not apply; because,
1. If the person summoned to show cause is the one designated by the fictitious name, then the record showed a full and absolute judgment against him already.
  - (a) If desired to obtain a judgment against him by his true name, the proper proceeding is under section 451 of the new code.
  2. If the person summoned to show cause is not the one designated by the fictitious name, then he is not a party to the action.
  - (a) If he is a third joint debtor, whose name, for some cause, was omitted from the

original summons, the remedy is under subdivision 4 of section 186 of the old code. *Freeman v. Barrowcliffe*, 818.

9. The summons in above proceedings must be accompanied by an affidavit of the persons subscribing it, that the judgment has not been satisfied, and specifying the amounts due them. Demurrer is not allowed by person summoned, the only pleading he is allowed to interpose is an answer. *Ib.*

10. In this case the objections of the plaintiff (a non-resident) to his examination before trial, were sustained on the ground that the affidavit upon which the order was granted omitted to state plaintiff's residence, or that inquiry had been made to ascertain it, or that there was difficulty in learning it. It also omitted to state whether plaintiff had appeared by attorney, no name, residence, or office-address of any attorney on plaintiff's behalf appearing in defendant's affidavit. Also, upon the ground that there was no proof of any notice to plaintiff of the order, or that any order, affidavit, or subpoena in relation thereto was served upon him. The affidavit and order were served upon plaintiff's attorney. *Dunham v. Mercantile M. Ins. Co.* 887.

11. When counsel for each party moves upon the trial for a direction to the jury in his favor, all questions are thereby submitted to the judge, and his findings as to any fact necessary to the direction he makes, is conclusive. *Thompson v. The Liv. S. Co.* 407.

APPEAL, 6; COSTS AND ALLOWANCES, 1; SLANDER AND LIBEL, 2.

#### PRESUMPTIONS.

See DEEDS, 2, 4; EVIDENCE, 9; PARTNERSHIP, 4; PAYMENT; QUESTIONS OF FACT AND OF LAW, 2; RAILROADS, 1.

#### PRINCIPAL AND SURETY.

1. Where a surety desires to request a creditor to pursue his principal, *e. g.*, to foreclose a mortgage,

where it is a corporation creditor the request must be made to some officer or agent who is authorized to act in the premises. An assistant to the solicitor of an insurance company's law department, which department examined vouchers, the surrender of death claims, and had the supervision of all litigated business and general direction of it, but had no right to order the foreclosure of a mortgage, which right was vested in its president and finance committee, is not such officer or agent. If such assistant, however, could be regarded as a proper officer or agent to receive an unqualified request to foreclose a mortgage, yet he is not a proper officer or agent to receive a conditional request, which imposes on the corporation the duty of keeping itself advised as to when the conditions occur upon which the request is to become operative. Such a request is not the full and explicit one required. *Mutual Life Ins. Co. v. Davies*, 172.

2. A mere forbearance to collect, or a naked promise to forbear, is not extending time of payment so as to discharge surety. The mere abandonment of foreclosure proceedings upon payment, by a subsequent incumbrancer, of the costs and interest then due, and the receipt from such incumbrancer of interest subsequently falling due, there being no agreement to extend the day of payment of the mortgage, will not discharge one who stands in the position of surety for the mortgage debt, although he be the mortgagor. *Ib.*

3. The estate of surety upon an administrator's bond is liable for a default upon the bond occurring after surety's death. *Mundorff v. Wangler*, 495.

What is sufficient evidence of jurisdictional fact of death, as against one sued as surety on an administrator's bond. See *Mundorff v. Wangler*, 495.

See EXECUTORS AND ADMINISTRATORS, 4; MORTGAGES, 5.

#### QUESTIONS OF FACT AND OF LAW.

1. *Held*, that the intestate's meaning,



in giving his instructions as to the disposition of the property, should have been distinctly submitted to the jury as a question of fact. *Ross v. Harden*, 26.

2. In this case, whether a reasonable time had elapsed, is a question of law. No fact is stated to explain the execution not being returned for two years after it was issued, and no reason can be presumed for it. It must be held that a reasonable time did elapse without proceedings being taken by plaintiff. *Mills v. Hicks*, 527.

See MASTER AND SERVANT, 1; SALE, 1; TRIAL, 5.

### RAILROADS.

1. When a train is in motion and a man appears with a conductor's cap and badge, and acts as such and is so recognized, it must be presumed that he is in the railroad company's employment as a conductor. *Hoffman v. N. Y. C., &c. R. R. Co.*, 1.
2. The duty of protecting the train from trespassers, and of removing them from it, seems to be incident to, and within the scope of such powers as belong to the person in charge of it,—i. e., the conductor. *Ib.*
3. The conductor and driver of street-cars are the agents and servants of the corporation or persons by whom they are employed, and to their judgment, care and skill the conveyance and safety of the passengers are confided. This duty must be discharged by them with diligence, prudence and foresight. *Hendricks v. Sixth Ave. R. R. Co.*, 8.
4. The introduction of a manifestly intoxicated, quarrelsome and indecently attired man into a street-car by the employees of the company is an act of negligence, for the consequences of which the company is liable; and when the conductor admits such a person into the car, in response to a statement of the driver that such person is "too full" to ride on the front platform, the negligence is aggravated and unjustifiable. A verdict against the company for

damages for personal injuries sustained by a passenger from an unprovoked assault by such person under such circumstances, should not be set aside on the ground that there is no evidence of negligence. *Ib.*

5. Trustees for holders of railroad mortgage bonds, in possession of and operating the railroad, do not fall within exception from the rule respondeat superior, accorded to an employer occupying a representative or official character. *Faulkner v. Hart*, 471.

See EVIDENCE, 11.

### RATIFICATION.

See BANKS AND BANKING, 3.

### REAL PROPERTY.

1. When there is a conflict of opinion among competent men as to whether whole of the premises contracted to be sold fall within description of conveyances through which vendors derive title, *the title is not marketable*. *Diets v. Farriah*, 190.
2. Where one traces a clear paper title from a conceded owner, and is in possession, it is unnecessary for him, as against one whose only claim is under a lease made by a municipal corporation on a sale for taxes, to show a possession prior to his by the conceded owner, or any subsequent grantee deriving title from such conceded owner. This, although he who claims under the tax lease had been in actual possession over twenty years, and the one claiming the fee had but recently entered upon the premises and obtained possession by putting the holder of the tax lease off his guard. *Bensel v. Gray*, 372.

See COVENANTS; DEEDS, 1; INTERJUNCTION, 3; PARTNERSHIP, 3-5.

### REARGUMENT.

When the former decision is based in part on a decided case, which has subsequently been reversed by the court of appeals, reargument

will be ordered. *Freeman v. Falconer*, 579.

### RECEIVERS.

A judgment dissolving a copartnership and appointing a receiver may be amended, after appeal therefrom, by the insertion of a clause directing the receiver to take possession of the partnership property, and ordering the parties to deliver the same to the receiver, and by the insertion of a clause authorizing and directing the receiver to sell and dispose of the partnership property, "under and pursuant to the usual course and practice of this court, and to collect and receive the outstanding debts due to the said firm, and to hold and keep the proceeds of such sales and collections, until the final determination of this action or the further order of this court." This, although the appellate court has become possessed of the cause upon the appeal. *McKelvey v. Lewis*, 561.

### RECORDS.

See EVIDENCE, 9.

### RECOUPMENT.

See CONTRACTS, 8; SALE, 3.

### RES ADJUDICATA.

1. If a court had no jurisdiction to pronounce the decree at the time it was made, the decree could not become valid, because of the action of the court subsequently in denying a motion to vacate the same; such denial does not constitute the position of "*res adjudicata*" so as to bar an action. *Chapman v. Phenix Bk.*, 840.
2. *Van Dolsen v. Abendroth*, 43 *N. Y. Superior Ct.*, 470, followed as to *res adjudicata*, as to special partnership. *Durant v. Abendroth*, 463.

See TRIAL, 3.

### REVISED STATUTES AND SESSION LAWS.

1 *R. S.* 368, § 2. Promissory notes

signed by agent. *Joynson v. Richard*, 16.

2 *R. S.* 60. Right to disposition of property by will. *Ross v. Harden*, 26.

2 *R. S.* 449, § 17. Executors *de son tort*. *Ib.*

*Laws* 1847, ch. 450 (am'd 1870, ch. 78). Action for causing death by wrongful act, &c. *Cornwall v. Mills*, 45; *McDonald v. Mullory*, 80.

*Laws* 1851, ch. 886. Act April 9, 1805. *Laws* 1842, p. 184. *Laws* 1851, ch. 886 (am'd 1854, ch. 101; 1853, ch. 301, § 14). *Laws* 1871, ch. 574, § 7; 1873, ch. 112, 335, § 112, 757, § 20. Schools, Board of Education, &c., N. Y. City. *Donovan v. B'd of Ed. &c.*, 53.

1 *R. S.* (6 ed.) pp. 120, 127. Boundaries and political jurisdiction N. Y. State. *McDonald v. Mallory*, 80.

*Laws* 1848, 1849, 1860, 1862. Married woman's acts. *Cashman v. Henry*, 93.

2 *R. S.* 135, § 6. Statute of frauds. *Chamberlain v. Ib.* 116.

2 *R. S.* 681. Perjury, &c. *Seymour v. Fellows*, 124.

*Laws* 1854, ch. 400; 1863, ch. 144. Continuance of partnership name. *Freeman v. Falconer*, 132.

*Laws* 1855, ch. 6. License to enter premises for building purposes. *Sun, &c., Ass. v. Tribune Ass.* 136.

2 *R. S.* 675, § 70. Sunday labor. *Ib.*

*Laws* 1840, ch. 80; 1858, ch. 187; 1862, ch. 656; 1870, ch. 277; 1873, ch. 821. Married woman's insurance.  *Fowler v. Butterly*, 148.

*Laws* 1870, ch. 137, § 85. Charter N. Y. City, 1873. Fire commissioners N. Y. City. *Wood v. Mayor, &c.*, 821.

*Laws* 1830, ch. 320, § 23; 1837, ch. 460, § 65; 2 *R. S.* *Edm.* p. 498. Administrator's bonds. *Mundorff v. Wangler*, 495.

*Laws* 1852. Navigation of ocean by steamships. *Mills v. Hicks*, 527.

1 *R. S.* 718, 719, 720. Ultimate property in lands, and right to hold same, &c., by aliens and others. 1 *R. S.* 753, 754; 2 *R. S.* 57. Descents. *Laws* 1830, ch.

- 171; 1843, ch. 87; 1845, ch. 115; 1857, ch. 576; 1874, ch. 261; 1875 ch. 38. Aliens, &c. *Renner v. Muller*, 535.
- 2 *R. S.* 137, §§ 1, 5. Conveyances to hinder and defraud creditors. *Gottberg v. Conner*, 554.
- Laws* 1870, ch. 382, § 3. Prohibiting N. Y. Supervisors increasing salaries. *Rowland v. Mayor*, 559.
- 2 *R. S.* (6 ed.) 534, 552. 1 *R. S.* 558. State Reports of R. R. Co's. *Leonard v. N. Y. C., &c. R. R. Co.*, 575.

### RULES OF COURT.

- General rule, 89. *Levy v. Loeb*, 291; *Corbett v. De Comeau*, 306.

### SALE.

1. It is a general rule, that when a contract of sale has been effected and concluded by parties through the agency of a broker, that the broker's memorandum of sale, and the bought and sold notes, constitute the evidence of the contract, and no parol evidence is admissible to vary the same. But when (as in this case) it is a contested question of fact whether or not the sale was effected and concluded through the agency of a broker, that question should be submitted to the jury. *Marcus v. Thornton*, 411.
2. It is only in cases of executory contracts, and without warranty, that a purchaser accepting goods and retaining them, without notice to the seller or offering to return them within a reasonable time, is held to waive all defects as to their quality, &c. (see cases cited in opinion of court). *Ib.*
3. In case of warranty, the purchaser is not bound to accept what he did not buy; and if he does accept, he has a right to recoup the damages arising from a breach of the warranty (*Day v. Pool*, 52 *N. Y.* 416; *Downce v. Dowe*, 57 *Id.* 16). *Ib.*

See CONTRACTS, 8; CONVEYANCES TO HINDER, &c. CREDITORS; EVIDENCE, 6; TRUSTS, 1-3.

### SAVINGS BANKS.

See BANKS AND BANKING.

### SHERIFF.

1. Liability incurred by a sheriff in the taking and detention of property cannot be discharged by any act of his own, without the assent of the owner of the property. A return of the property, without such assent, will not release the sheriff, nor will a subsequent levy and sale under process in favor of the sheriff afford him any protection as against the first unlawful taking (see numerous cases cited in the opinion of the court). *Parker v. Conner*, 416.
2. But, as an exception to the above general rule, it is equally well-settled, that if the property be taken again from the trespasser, without his agency or connivance, and by the act of a third person and the operation of law, and applied to the owner's use, although without the latter's consent, the jury, in estimating the damages of the owner, may take into consideration, as mitigation of the same, such a taking of the property and its application to the owner's use and benefit. Such application is held to be equivalent to a return of the property, and its acceptance by the owner (see cases cited by the court). It is not the fact of the subsequent seizure that gives this defense, but that it has been seized under such circumstances that the owner has had or could have the benefit of it (*Bull v. Liney*, 48 *N. Y.* 6). It matters not whether such mitigating circumstances occurred before or after the commencement of plaintiff's action (*Dailey v. Crowley*, 5 *Lans.* 301). *Ib.*
3. In this case the sheriff took the plaintiff's property from his possession, at One hundred and twenty-first street, New York, June 30, 1874, removed the same to Duane street, and on July 23, 1874, sold the same to one McLoughlin for \$225, assuming to take and sell the property under an execution in his hands, against one John Halloran, from whom the plaintiff had previously acquired title to the property. On August 12, 1874, the sheriff received an execution against the

plaintiff in favor of one Percy, and thereupon he levied upon the same property under and by virtue of this last execution, and sold the same again to the said McLoughlin, the former purchaser, for the sum of \$5. *Held*, 1st. That this was not a fair sale, as against the rights of plaintiff that had then accrued, because the value of the property had been seriously affected by its removal and former sale to McLoughlin. 2d. That even upon the assumption that this second levy and sale was a taking of the property by a third person within the meaning of the exception stated, that the defendant did not prove an amount exceeding \$5 in mitigation, under the rulings in the case of *Ward v. Benner* (31 How. 411), wherein it was held that the measure of damages was the actual value of the property, at the time of the illegal taking, less the amount which it produced at the sale. *Ib.*

See DEEDS, 1.

#### SLANDER AND LIBEL.

1. The term "blackmailing" is libelous *per se* (*Edsall v. Brooks*, 2 Robt. 34). *Robertson v. Bennett*, 66.
2. The law and practice of libel, especially in regard to publications in newspapers, discussed. Damages allowed plaintiff (\$10,000) held not excessive, but judgment was reversed on the ground of erroneous admission of evidence. *Ib.*

#### SPECIFIC PERFORMANCE.

In this case the plaintiff, a married woman, owned certain real estate subject to a purchase-money mortgage for \$22,000, executed by her. She entered into a contract with defendant to sell and convey the said real estate, and defendant covenanted and agreed to pay this mortgage as a part of the purchase-money. Plaintiff executed the contract on her part by conveying the property to a third person, as requested by defendant, subject to the lien of the mortgage, but without any covenant of the gran-

tee to pay said mortgage. The mortgage not being paid according to its terms, the mortgagee commences an action to foreclose the same, making plaintiff a party defendant, to answer for any deficiency on the sale. The plaintiff commences this action against defendant for the specific performance of his contract to pay said mortgage. *Held*, that said contract cannot be enforced specifically until it is established, with definiteness and certainty, 1st. That there will be a deficiency on the sale of said real estate. 2d. The amount of that deficiency, *Slawson v. Watkins*, 73.

#### STATUTE OF FRAUDS.

A check signed by one of the parties, and a receipt given for the check, stating that the check was given in the exchange of properties, mentioning them, and stating the prices of the property, signed by the other party, constitutes a valid contract as against the party signing the receipt, and raises a sufficient consideration for the check. The contract thereby made is sufficient under the Statute of Frauds. *Raubitschek v. Blank*, 564.

See SALE, 1.

#### STATUTES.

1. A State has a right of jurisdiction, through its law, over a vessel belonging to it, that is on the high seas (*Crapo v. Kelly*, 16 Wall. 610, and authorities there cited; and also *Thuhler v. Trans. Co.*, 35 N. Y. 852). But where the exercise of the right of jurisdiction is committed by the State to its legislators or officials, that exercise is limited, 1st, by the powers given to them by the State; 2d, by their intent as expressed or manifested by statute or action; that is, in the present case, whether or not the statute extends to vessels on the high seas, depends upon the intent of the legislature in that respect in enacting the statute. *McDonald v. Mallory*, 80.
2. Negative expressions will impress a mandatory character on a statute. Imposition of duty and giv-

ing the means of performing it, will have a like effect. *Jessup v. Carnegie*, 260.

See CONSTITUTIONAL LAW.

#### STENOGRAPHERS' FEES.

This action was brought by the plaintiff, a stenographer, to recover the value of services alleged to have been rendered by him at defendant's request, &c., in taking minutes of testimony, &c., in certain legal proceedings in which defendant appeared as attorney for one of the parties thereto. *Held*, that the defendant being the agent of a known principal, did not incur a personal liability by simply requesting the performance of such a service for his client, and also that there was no evidence in the case of an agreement on his part to be liable therefor, nor anything from which it could be safely said that it was the intention of the parties that the defendants should be so responsible (*Bonyng v. Waterbury*, 12 *Hun*, 534; and *Sheriden v. Genet*, *Id.* 660, followed). *Bonyng v. Field*, 581.

#### STOPPAGE IN TRANSITU.

Stoppage in transitu. Effect of as causing failure of consideration of promissory note. See *Babcock v. Bonnell*, 568.

#### SUNDAY.

Labor performed on Sunday is not *ipso facto* illegal. The statute excepts works of necessity and charity (2 *R. S.* 675, § 70. See also *Merritt v. Earle*, 29 *N. Y.* 115). *Sun Ass. v. Tribune Ass.*, 186.

#### SURROGATES.

See JUDGMENTS AND DECREES.

#### TAXES AND ASSESSMENTS.

See *N. Y. City*, 6.

#### TELEGRAPH COMPANIES.

Dispatch as follows: "Can close Valkyria and Othere, 22, 20 net, Montreal. Ans. immediately." *Held*, that commissions which the

sender would have earned as a broker in effecting a charter of two vessels named Valkyria and Othere, if the message had been duly transmitted, were not damages either actually contemplated, or to be fairly supposed to have been contemplated by the defendant, and therefore not recoverable. Damages for non-delivery not contemplated, are not recoverable against companies. *McColl v. W. U. Tel. Co.*, 487.

#### TIME.

See CONTRACTS, 7, 8; QUESTIONS OF FACT AND OF LAW, 2.

#### TITLE.

Where there is conflict of opinion among competent men, as to whether the whole of the premises contracted to be sold fall within the description of the conveyances through which the vender claims to derive title thereto, the title is not marketable. *Diets v. Farrish*, 190.

See BILLS, NOTES AND CHECKS, 2; REAL PROPERTY, 2.

#### TRADEMARKS.

1. The principles of law applying to patents and contracts of license of the same, and the payments of royalties thereupon, should be applied to registered trademarks, and therefore the defendant, as licensee of a registered trademark, is not in a position, while he holds the license and uses the trademark, to set up and maintain, in an action to recover the royalty or fees provided for in the license, the defense that the trademark is invalid. However, if he was induced to enter into the contract by fraudulent representations, he has a right to interpose that as a defense (*Sexton v. Dodge*, 57 *Barb.* 116; *Marsten v. Sweet*, 66 *N. Y.* 212). *Hilsen v. Libby*, 12.
2. Every manufacturer and every person for whom goods are manufactured, has a right to distinguish the goods he manufactures, or sells, by a peculiar mark or de-

vice, that they may be known as his in the market, and he is entitled to protection of the same, irrespective of the fact that similar goods are manufactured or sold by others (see cases cited in opinion). *Held* also, by the court below, that this right extends to a vendor who merely sells, and has no direct relation to the manufacturers. *Godillot v. Hazard*, 427.

3. A trademark may consist of anything not already appropriated; marks, forms, symbols, which designate the true origin or ownership of the article; this, although the words adopted are in common use. It cannot, however, consist of anything which merely denotes the name or quality. There can be no right to the use of mere generic words. *Ib.*
4. The language of Lord Justice GIFFORD, in *Lee v. Haley* (39 *Law Journal*, 380), approved; "The principle upon which the cases go is not that there is a property in the word, but that it is a fraud upon a person who has established a trade," &c., &c. *Held*, in this case, that the injunction sought to be obtained in the action should be granted. *Ib.*

### TRIAL.

1. Where there are averments, which, taken by themselves, would constitute a cause of action based on contract, but not stated as constituting a separate cause of action, but on the contrary so intimately interwoven with other averments as to show that the whole theory of the action was based on tort, to wit, fraudulent representations; and upon a motion being made on the trial after all the evidence was in, for a dismissal of the complaint, on the ground that an action could not be sustained on the false representation stated in the complaint, the plaintiff made no claim that the evidence sustained any part of the complaint as showing an action on contract; and the court granted the motion, to which plaintiff excepted; and ordered the excep-

tions to be heard in the first instance at the general term. *Held*, on hearing the exceptions, that the complaint must be regarded as containing but a single cause of action, viz.: one in tort, and that plaintiff could not sustain his exceptions on the ground that the evidence sustained those averments in the complaint, which, if taken separately, might be deemed to state a cause of action in contract. *Sparrman v. Keim*, 163.

2. Where a motion is made for a dismissal of the complaint upon several grounds, the fact that untenable grounds are also assigned, will not cure an erroneous ruling on an assigned tenable ground. This, although but a single exception is taken to the denial of the motion. *Durant v. Abendroth*, 463.
3. Where the motion for dismissal is made upon the ground that no cause of action is proven, a defense established by conceded or undisputed facts, which shows that the claimed cause of action never existed, *e. g.*: *res adjudicata* against plaintiff on his claimed cause of action, may be urged in support thereof. *Ib.*
4. The failure to except to a direction of verdict for plaintiff on the court's own motion, does not affect defendant's right to a new trial, if his motion to dismiss was well founded. This, although the case comes before the general term upon exceptions so ordered to be heard on the court's own motion. *Ib.*
5. The perception of a jury may ascertain from the character and make-up of a fiction, what real event the fiction was meant to hide. *Branch v. Levy*, 507.

See DEATH, ACTION FOR, &c., 2;  
JUDGE'S CHARGE.

### TRUSTS.

1. The estate of a *cestui que trust* is liable and can be held for the fraud of a trustee, by a purchaser of the trust property itself for a full and fair price, without notice or knowledge of the trust. *Hollemback v. More*, 107.
2. The contribution of trust proper-



ty to the capital stock of a copartnership at the time of its formation, by a trustee, as his own property, and so contributed without notice or knowledge to the other copartners of the fact of its being trust property, is closely analogous to its sale and purchase. There is but little if any difference in principle. In such case the *cestui que trust*, seeking his property (thus converted) from copartnership assets, can only claim and take therefrom what his trustee would be entitled to take had he been vested with absolute ownership of the funds invested by him in the copartnership, instead of holding the same as he did, merely in trust. *Ib.*

3. The equities of the copartners of a trustee, dealing with him as the absolute owner of the property contributed by him to the copartnership, and without notice or knowledge of any trust relations in regard to the same, are paramount to those of the *cestui que trust* in regard to such property. *Ib.*

4. Trustees for holders of railroad mortgage bonds, in possession of and operating the railroad, do not fall within the exception from the rule, *respondeat superior*, accorded to an employer occupying a representative or official character. *Faulkner v. Hart*, 471.

5. Where property used for partnership purposes, the legal title to which is in one of the copartners, is deemed held in trust for firm, and to be assets thereof. See *Chamberlain v. Chamberlain*, 116.

#### U. S. LAW.

1. War gives to the sovereign the right to take the persons and confiscate the property of enemies wherever found. *Chapman v. Phenix Natl. Bk.*, 840.

2. The right to condemn and confiscate the property of enemies captured on the high seas, exists by the law of nations. Before the courts of the United States can condemn and confiscate, as a consequence of the declaration of war, any property of an enemy found on land at the commence-

ment of hostilities, provision by law must be made for that purpose. The right to enact such a law exists, and when enacted by the sovereign power of the United States, the judicial department must give effect to the same. But until such enactment, no power of condemnation can exist in the courts (*Brown v. United States*, 8 *Cranch*, 110; *Miller v. United States*, 11 *Wall.* 268). *Ib.*

3. The acts of Congress as to confiscation of property used for insurrectionary purposes, under act of congress of August 6, 1861, and of property of rebels, under act of July 17, 1862, reviewed and commented on. The provisions of these acts taken together and construed with reference to the purposes therein avowed and also expressed in their respective titles, unmistakably show that the intention of Congress was to provide not only a complete system for the capture and condemnation of property, liable to be considered as enemy's property; but a system that should be most effective in times of great national commotion, peril, and distress; and with that end in view, it invested the district courts of the United States with full and general powers to take cognizance of, and inquire into all offenses under said acts. *Ib.*

4. The jurisdiction of the United States district courts in these cases does not depend upon the fact of the commission of the offense alone, but embraces the power to hear and determine all cases arising under these statutes; and if in any case it shall be found that the property brought before the court belongs to a person guilty of an offense under said acts, then it may be condemned as enemies' property. *Ib.*

5. In the case at bar all the proceedings and formalities required by said acts, and necessary to confer jurisdiction upon the district court, and render its decision binding, were had and complied with, and the decree of condemnation was made in the course of a judicial inquiry, in a matter over which

the court had jurisdiction, and the decree cannot be impeached in any other court. The case comes directly within the principle enforced by the court of appeals in *Roderigas v. East River Savings Institution*, 63 *N. Y.* 460, and reaffirmed in recent case of *Lange v. Benedict*, 18 *Alb. Law J.* 11, and *Hunt v. Hunt*, referred to in 6 *N. Y. Weekly Dig.* 313. *Ib.*

§§ 2947 and 4937 U. S. Stat. at L. Trademarks, &c. *Hilsen v. Libbey*, 12.

R. S. § 4472. Contraband freight. *McDonald v. Mallory*, 80.

Act. Cong., Feb. 10, 1855. Citizenship. *Renner v. Muller*, 535.

### WAIVER.

It is only in cases of executory contracts, and without warranty, that a purchaser accepting goods and retaining them, without notice to the seller or offering to return them within a reasonable time, is held to waive all defects as to their quality, &c. (see cases cited in opinion of court). *Marcus v. Thornton*, 411.

See CONTRACTS, 8; COVENANTS, 2; DELIVERY, 3; INSURANCE, 5; MORTGAGES, 6; TRIAL, 1.

### WARRANTY.

In case of a warranty, the purchaser is not bound to accept what he did not buy; and if he does accept, he has a right to recoup the damages arising from a breach of the war-

ranty (*Day v. Pool*, 52 *N. Y.* 416; *Downce v. Dowe*, 57 *Id.* 16). *Marcus v. Thornton*, 411.

See CONTRACTS, 8: SALE, 2.

### WITNESS.

1. The maxim *falsus in uno falsus in omnibus*, is not of universal application. The uncontradicted testimony of even a forsworn witness, if corroborated, must not necessarily be utterly rejected and disregarded. The true rule is that the jury is at liberty to reject utterly the testimony of a witness who has deliberately sworn falsely in regard to any material fact in the case, except in so far as he is corroborated by other credible witnesses, or by necessary inferences from undisputed facts. *Seymour v. Fellows*, 124.

2. The necessity and right to cross-examination considered, and the authorities reviewed. *Butler v. Flanders*, 531.

3. As between the keeper of a house of ill fame, and the landlord who rents the house for that purpose, and the person who equips it for that purpose, neither has any advantage over the other in morals, and neither is to be more favorably considered by the court or jury in weighing testimony, and determining the credit to be given. *Hewitt v. Morris*, 557.

See EXAMINATION BEFORE TRIAL, 4.





















